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ABSTRACT

School officials face a daunting array of legal responsibilities in managing student transportation. This monograph identifies and discusses the most important transportation problems facing school officials, despite the considerable variances among state requirements. Following the introductory section, section 2 describes school districts' and school boards' liability for transportation decisions, including school-bus safety and requirements, selection of transportation, care owed to students during transportation, and school defenses in transportation literature. The third section outlines the legal responsibility involved in the school district's duty to transport students, including governance decisions, general financial considerations, funding of transportation, transportation of nonpublic students, transportation for special-needs students, and transportation for desegregation purposes. A conclusion reached in the final section is that legislative or administrative statutes or regulations face judicial scrutiny under federal and state constitutional standards, as well as consistency within the total state legislative scheme. Transportation guidelines, a table of cases, and an index are included. (LMI)

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PUPIL TRANSPORTATION AND THE LAW

SECOND EDITION

Ralph D. Mawdsley

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NOLPE

No. 55 in the NOLPE Monograph Series

Pupil Transportation and the Law

Second Edition

Ralph D. Mawdsley

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DEDICATION

To my wife, Alice, who faithfully transported our two sons, Jonathan and James, to and from school and their activities, and to parents and bus drivers everywhere whose labors in transporting children provide, literally, vehicles to learning.

About the Author

Ralph D. Mawdsley is Professor and Chair, Department of Counseling, Administration, Supervision and Adult Learning, Cleveland State University. Prior to accepting this position, he spent twelve years at Liberty University serving as Professor of Education Law, Administrative Counsel, and Vice President of Human Resources. In addition to his higher education experience, he completed thirteen years as a teacher in public and nonpublic schools, as well as serving as a school superintendent. His education includes a J.D. from the University of Illinois and a Ph.D. from the University of Minnesota where he was an Adjunct Professor teaching courses in School Law and Tort Liability.

He has published widely on topics pertaining to all levels of education and has over 150 publications to his credit, including nine books or monographs. Among his publications are several NOLPE monographs, including *Legal Problems of Religious and Private Schools, Academic Misconduct: Cheating and Plagiarism, Free Expression and Censorship: Public Policy and the Law*, and an earlier edition of *Pupil Transportation and the Law*. For the past ten years, he has annually written the chapter on "Employees" for the *Yearbook of Education Law*. He has served NOLPE on the program, publications, membership and dissertation committees, as well as serving as Chair of the McGhehey Award and on the Board of Directors. He is a frequent contributor to *West's Education Law Reporter* and since 1985 has served on the publication's Editorial Advisory Committee. In 1994, he was appointed Commentaries Editor for the journal, *Religion and Public Education*, for which he also serves on the Editorial Board.

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I. Introduction

The responsibility of school boards and superintendents to provide transportation for students has become one of the most daunting tasks in the increasingly complex world of school administration. Like some three-dimensional jigsaw puzzle, school officials must sort through seemingly endless and complex statutes and regulations to arrange transportation for all categories of students designated by state statute, as well as categories mandated by federal statutes or court orders. For the typical administrator, this will mean students residing farther than the maximum walking distance, nonpublic students traveling to schools within or outside the district, and students with disabilities. In some larger school districts still under court-ordered busing, arrangements will also have to be made to bus students in conformance with the court order. Besides the scheduling problems suggested already, school officials may be called upon to provide transportation to groups for which no state reimbursement is available and therefore a user fee must be charged.

In addition, school officials must recruit and train qualified bus drivers who satisfy the state standards and must continually monitor the drivers to assure that they operate buses in conformity with state requirements. School boards that operate their own buses must regularly inspect them to determine that they comply with state standards. If school boards decide to contract out bus transportation, they must comply with state bidding requirements and monitor the contractors since the school boards do not abrogate their statutory responsibilities simply by contracting out services.

All of the above operational decisions are played out against a backdrop of possible tort liability where students or members of the public are injured as a result of the operation of a school bus. Responsibility for student safety requires ongoing review of such matters as selection of bus stops and focused attention to parent or student complaints. The possibility of disruptive behavior on buses may demand consideration of new supervision techniques, such as the use of videotape cameras on buses. When injuries or property damage occur, school officials must be alert to notices of tort claims that are frequently a prelude to a lawsuit. Defenses, such as governmental immunity and contributory negligence, which may be available, do not offset the time and energy that must be invested to adequately defend a charge of negligence.

In short, the tasks of school officials in managing school transportation are never easy. Despite the considerable variances among the states regarding requirements for pupil transportation, the purpose of this publication is to identify and discuss the most important transportation problems facing school officials.

II. Liability for Transportation Decisions

A. School Bus Safety Requirements

The responsibility of school districts and school board members to provide a safe and comprehensive transportation system is subject to the general principles of negligence, except where those principles have been altered by statute. Although considerable litigation is generated each year regarding school transportation, school buses on the whole "have an extremely good safety record, considering the pupil miles traveled and the type of rider involved."[1] The safety record of buses is no doubt due in significant part to comprehensive bus safety legislation in many states imposing such requirements as single body construction,[2] regular school bus inspections,[3] maximum passenger capacities,[4] prohibition of the use of recapped tires,[5] presence of mirrors,[6] use of stop signal arms and lights,[7] location of fire extinguishers,[8] required chauffeur's licenses for drivers,[9]

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[1] E. Connors, Educational Tort Liability and Malpractice (1981) at 67.

[2] *See* Pa. Stat. Ann. tit. 75, § 4552(c) (1977) ("a single, closed metal body with adequate ventilation").

[3] *See, e.g.*, Minn. Stat. Ann. § 169.451 (West Supp. 1994) (bus cannot operate more than 13 months without an inspection); Fla. Stat. Ann. § 234.02(10) (West Supp. 1994) (examination of each bus made by capable mechanic at least once each month bus is in operation); Iowa Code Ann. § 321.374 (West Supp. 1994) (bus must be inspected before first being put into use and then at least once a year after that); S.C. Code § 59-67-270 (1977) (school buses "subject to inspection at any time or place by officers of the State Highway Patrol").

[4] *See, e.g.*, Minn. Stat. Ann. § 169.447(1) (West Supp. 1994) ("not more than the number of pupils or passengers that can be fully seated ... [and in any case] not more than the manufacturers rated seated capacity"); Pa. Stat. Ann. tit. 75, § 4552(d) (1977) ("... no passenger shall be carried for which adequate seating is not available and used"). *But see* S.C. Code § 59-67-100 (1977) ("... seating space shall be provided for each pupil transported. *Provided, however*, that a limited number of standees may be permitted until the bus routes can be adjusted to accommodate the overload but not to exceed twenty school days"). *See also* Cal. Educ. Code § 39834(a) (West 1993) (overloading bus in excess "of the limits of its seating capacity" a misdemeanor).

[5] Minn. Stat. Ann. § 169.447(3) (West Supp. 1994) (applies to front wheels only).

[6] Iowa Code Ann. § 321.437 (West Supp. 1994) (must provide driver view at least 200 feet to rear of vehicle).

[7] *See, e.g.*, Minn. Stat. Ann. § 169.442(3) (West Supp. 1994); Iowa Code Ann. § 321.372 (West 1985); Pa. Stat. Ann. tit. 75, § 4552(b.1) (Supp. 1994).

[8] Cal. Educ. Code § 39838 (West 1993) (at least one fire extinguisher per bus with aggregate rating of at least 8-B, C units); Pa. Stat. Ann. tit. 75, § 4552(f) (1977).

[9] *E.g.*, Fla. Code Ann. § 234.091 (West Supp. 1994). *See also* Cal. Educ. Code § 39833 (West 1993) (operation of school bus without appropriate license a misdemeanor).

and required seat belts for drivers.[10] However, mandatory seat belts for passengers have been excluded in some cases by statute or case law.[11] In addition, the use of a particular color may be reserved by statute for buses being used as school buses.[12]

Statutes frequently extend beyond the condition and operation of the school buses themselves and impose requirements on drivers of other vehicles on a highway.[13] States generally define what constitutes a school bus and may do so quite expansively to include "any motor vehicle while being used for the transportation of any school pupil at or below the 12th grade level to and from a public or private school or to and from public or private school activities."[14]

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[10] *E.g.*, IOWA CODE ANN. § 321.445 (West Supp. 1994); ILL. ANN. STAT. ch. 625, ¶ 5/12-807 (West 1993) ("No school bus shall be operated unless the driver has properly restrained himself with the lap belt assembly.").

[11] *E.g.*, IOWA CODE ANN. § 321.445(2)(d) (West Supp. 1994). *Cf.* ILL. ANN. STAT. ch. 625, ¶ 5/11-40/2a (West Supp. 1994) (prohibits municipalities from requiring school buses be equipped with seat belts in certain situations) *with* ALASKA STAT. § 28.05.104(a)(2) (1994) (requires school districts to provide instruction on proper use of seat belts "if school children in the district or area are transported in buses equipped with seat belts"). *See also* Dentson v. Eddins & Lee Bus Sales, Inc., 491 So. 942 (Ala. 1986) (no violation of state extended manufacturer's liability of implied or expressed warranty of merchantability by manufacturing and selling school bus without seat belts for students). In addition, *see* Schwartz v. Volvo N. Am. Corp., 554 So. 2d 927 (Ala. 1989) (*Dentson* reaffirmed in dismissing claim based on manufacturer's failure to install air bag).

[12] *See* MINN. STAT. ANN. § 169.448(1) (West Supp. 1994) (a bus not being used as a school bus cannot operate on highways unless "painted a color significantly different than national school bus glossy yellow or Minnesota school bus golden orange"); FLA. STAT. ANN. § 234.041 (West 1989) (person guilty of misdemeanor if using "bus of an orange or yellow color known as 'school bus chrome' " for other than transporting persons to educational or recreational facilities); IND. CODE ANN. § 20-9.1-5-18 (West 1984) (bus not used to transport school children can be painted any color "except the national standard school bus chrome yellow").

[13] *E.g.*, MINN. STAT. ANN. § 169.444(2) (West Supp. 1994) (driver who fails to stop for stopped bus receiving or discharging children guilty of misdemeanor or gross misdemeanor); IOWA CODE ANN. § 321.372A (West Supp. 1994) (mandating investigation by state police if bus driver reports vehicle that failed to stop). *See* State v. Wolfram, 577 N.E.2d 442 (Ohio Ct. App. 1989) (driver who was behind school bus and who drove through parking lot adjacent to stopped bus and exited in front of bus did "overtake" bus in violation of statute). *See also* PA. STAT. ANN. tit. 75, § 4553(a)(2) (Supp. 1994) (mass transit bus equipped and identified as school bus for purposes of transporting school children comes within statutory provision requiring motorists to stop).

[14] CAL. EDUC. CODE § 39830(a) (West 1993). However, the statute has numerous exceptions, such as "a motor vehicle of any type carrying only members of the household of the owner thereof." *Id.* at § 39830(c). *See also* FLA. STAT. ANN. § 234.051 (West Supp. 1994) (school bus is any motor vehicle used regularly to transport children to prekindergarten through grade 12, with exceptions, such as "passenger cars, multipurpose passenger vehicles and trucks....").

Although school districts probably have only a standard of care of ordinary diligence to keep school buses in safe operating condition, that standard may require an ongoing maintenance program. In *Kirby v. Spate*,[15] a Georgia court held that a question of fact existed as to whether ordinary diligence had been exercised in replacing deteriorative brake parts only after they became defective rather than having an ongoing maintenance program that periodically checked for deteriorative brake parts.

Except where state boards of education receive their authority to establish regulations directly from the state constitution,[16] state boards of education are usually delegated by state legislatures to adopt regulations pertaining to the transportation of children and, when adopted, such regulations have the force and effect of law.[17] However, the responsibility for implementing a safe means of transportation rests with each school district.[18] State statutes may even give local boards authority to determine whether taxpayer supported transportation needs to be provided.[19] Since local school officials, from the bus driver to members of the school board,[20] will likely be sued in the event of an injured student, it is especially necessary for local officials and board members to be aware of potential legal problem areas.

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[15] 448 S.E.2d 7 (Ga. Ct. App. 1994).

[16] *See* West Virginia Bd. of Educ. v. Hechler, 376 S.E.2d 839 (W. Va. 1988) (state board of education rule making authority pursuant to "general supervision" granted to board under state constitution prevented state legislature from requiring that rules be submitted to a legislative oversight commission prior to submission to entire legislature for acceptance or rejection).

[17] *E.g.*, N.C. GEN. STAT. § 115C-240 (1994) (allocation of money appropriated by legislation); Styers v. Phillips, 178 S.E.2d 583 (N.C. 1971); MINN. STAT. ANN. § 123.80 (West 1993) (implementation applies to all school districts receiving state aid); Mikes v. Baumgartner, 152 N.W.2d 732 (Minn. 1967); Anderson v. Ohm, 258 N.W.2d 114 (Minn. 1977). *See also* FLA. STAT. ANN. § 234.101 (West 1989) (requirements for school bus drivers); CAL. EDUC. CODE § 39831 (West 1993); Yeoman v. Department of Motor Vehicles, 78 Cal. Rptr. 251 (Ct. App. 1969); S.C. CODE ANN. § 59-67-490 (Law. Co-op. 1990) (State Board of Education must approve all school district bus routes).

[18] *See* FLA. STAT. ANN. § 234.02 (West Supp. 1994); GA. CODE ANN. § 20-2-1071 (1992).

[19] *E.g.*, CAL. EDUC. CODE § 39800 (West 1993). ***But see*** OHIO REV. CODE § 3327.01 (Page 1994) (local school board has authority to deny transportation beyond maximum walking distance only where confirmed in advance by state board of education).

[20] The individual liability of board members for the alleged tortious acts of school officials or themselves is often limited to those situations where board members are found to have acted in bad faith. *See* Walt Bennet Ford v. Pulaski County Special Sch. Dist., 624 S.W.2d 426 (Ark. 1981). H. HUDGINS & R. VACCA, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS 83 (1985). ("In order to hold a [school board] member liable, it must be shown that he was motivated by malice, corrupt motive, or attempt to injure.") However, school board members may be criminally liable for knowingly permitting to be used "any school bus transporting public school pupils in violation of any school transportation law." IOWA CODE ANN. § 285.14 (West 1988). *See also* GA. CODE § 20-2-2-1074 (1992) (board members, superintendents, or any other person can be guilty of a misdemeanor for transporting student for whom physician has determined transportation would be detrimental to health).

The variances among the states regarding safety features has prompted the federal government to adopt guidelines and standards regarding the manufacture, equipping, and operation of school buses. Among the more interesting of the guidelines are: use of a rod in front of the bus to keep children exiting and crossing in the front of the bus within the direct view of the driver; use of signal arms and lights by local transit buses when transporting school children; semiannual bus inspections; twice-a-year emergency evacuation drills for students riding buses; and seating accommodation for a person at least as large as a fifth percentile adult female.[21] More daunting and demanding are the highly detailed and technical performance requirements for school bus design and manufacture to protect bus occupants in the event of a crash,[22] requirements which have been incorporated by reference in state statutes.[23]

B. Selection of Transportation

1. Failure to Provide Transportation

Absent some legislative or judicial mandate[24] to provide pupil transportation, local school districts technically can decide not to furnish transportation.[25] Generally, if the provision of pupil transportation is truly optional, lawsuits to force districts to provide bus service will fail either because the state has declared no clear legislative intent to provide

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[21] 23 C.F.R. § 1204.4 (Highway Safety Program Guideline No. 17) (1991).

[22] 49 C.F.R. § 571.220 (Standard No. 220; School bus rollover protection), § 571.221 (Standard No. 221; School body joint strength), and § 571.222 (Standard No. 222; School bus passenger seating and crash protection) (1990).

[23] *See* FLA. STAT. ANN. § 234.051(2) (West Supp. 1994).

[24] *See* discussion of legislative and judicial mandates, *infra* notes 309-36 and accompanying text.

[25] *See, e.g.*, Arcadia Unified Sch. Dist. v. State Dep't of Educ., 825 P.2d 438, 446 (Cal. 1992) (in interpreting CAL. EDUC. CODE § 39800, the California Supreme Court has observed "school districts are permitted, but not required to provide bus transportation") A decision not to provide transportation is really academic since every state will furnish some form of transportation to at least some component of its constituency, if for no other reason, as part of its commitment to compulsory attendance. For example, "School boards ... shall provide transportation for each pupil who should attend a public school when, and only when, transportation is necessary to provide adequate educational facilities and opportunities which otherwise would not be available ...." FLA. STAT. ANN. § 234.01 (West Supp. 1994). However, except in certain categories, if bus transportation is optional then failure to provide or continue such transportation does not violate constitutional provisions. *See* MICH. COMP. LAWS § 380.246(d) (1988) (school board to provide transportation "if the board deems it advisable") and Sutton v. Cadillac Area Pub. Sch., 323 N.W.2d 582 (Mich. Ct. App. 1982) (failure to provide transportation not equal protection violation). *See also* Lintz v. Board of Educ., Alpena Pub. Sch., 325 N.W.2d 803 (Mich. Ct. App. 1982) (discontinuance of bus transportation due to shortage of funding not violation of constitutional provision requiring the maintenance of a state system of free public schools).

transportation[26] or because the state's constitution, legislature, or courts have declared no fundamental constitutional right to an education.[27]

The absence of legislative or constitutional mandates to furnish transportation does not insulate a school district from lawsuits where students are injured in situations where arguably the presence of transportation would have prevented the injury. In *Plesnicor v. Kovach*[28] a junior high student was injured as she crossed a street on her way home from school after her after-school participation in an extracurricular activity. The state in this case, Illinois, did not require that school districts provide transportation from extracurricular activities.[29] Alleging that Defendant school board knew of the high volume of traffic and absence of a traffic light, by which Plaintiff could have crossed the busy street safely, the complaint charged that the school board:

> (a) Failed to provide a system of bus transportation to transport students remaining after regular class hours to participate in extracurricular activities to their homes.
>
> (b) Provided a bus system for transportation of students which was defective, in that it did not provide transportation for students remaining after normal hours to participate in extra-curricular activities to their homes.[30]

In finding that the school district had no "affirmative duty ... to supply this missing bus service"[31] the court observed that the state statute made optional the provision of transportation from any school-sponsored

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[26] *See Lintz*, 325 N.W.2d at 805-06. ("[T]he [statutory] provision makes it clear that the legislature has the power but *not the duty*, to provide for the free transportation of students to and from all schools.") (emphasis in original).

[27] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (education not a fundamental constitutional right under federal constitution). *See also Sutton, supra* note 25 (education not fundamental constitutional right under state constitution). *But compare* Collins v. Ritchie, 351 S.E.2d 416 (W. Va. 1986) (education a fundamental constitutional right in West Virginia and failure to furnish transportation a violation of state constitutional provision providing for free and efficient schools); Shaffer v. Board of Sch. Directors, 687 F.2d 718 (3d Cir. 1982) (even though no state constitutional right to education, failure to provide two-way kindergarten transportation violated state statute requiring safe and effective transportation).

[28] 430 N.E.2d 648 (Ill. App. Ct. 1981).

[29] ILL. ANN. STAT. ch. 105, ¶ 5/29-3.1 (Smith-Hurd Supp. 1993) (in addition to transportation to and from school-sponsored activities being optional, school districts can charge for the transportation).

[30] *Plesnicor*, 430 N.E.2d at 650.

[31] *Id.* at 651. For a discussion of the broad range of duties by public school boards, *see* WILLIAM D. VALENTE, LAW IN THE SCHOOLS 51-85 (3d ed. 1994). For a discussion of nonpublic schools generally, *see* RALPH D. MAWDSLEY, LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS (3d ed. 1995).

activities and that educators should have no greater responsibility for such transportation than would parents under the state's in loco parentis statute.[32] In a case from another jurisdiction, but with a similar result, a California court held that because the statutory responsibility to transport was permissive only, damages were not recoverable for injury to a child walking home from school after the school district had reduced its two-way transportation to one-way.[33]

Although the absence of mandatory transportation requirements normally will not form the basis for a complaint grounded in negligence, individual variant fact situations may arise that require the imposition of liability. In *Foster v. Houston General Insurance Co.*,[34] two teachers of mentally retarded students and a school board were held liable for the death of one of the students who had run out into a street at a busy intersection. The teachers had elected to walk ten or eleven mentally retarded students three blocks from their school to the gymnasium, a journey which required the crossing of a busy street. Although the teachers had not requested transportation to the gymnasium, evidence was offered that the district had a policy not to provide transportation for short trips. Whether or not such a policy existed, the school board's liability under the doctrine of *respondeat superior* was premised on the teachers' "failure to provide alternate transportation."[35] The imposition of liability in *Foster*, based on a unique set of facts in this case due to the nature of the students and the danger represented by the busy street, indicates that transportation decisions need to be evaluated according to criteria other than requirements of statutes or constitutions. To the extent that transportation decisions need to be assessed in light of traditional tort liability concepts (duty, reasonable person, foreseeability, and proximate cause), school administrators will find a great deal of similarity to a wide variety of other school areas of potential liability.[36]

An example of the application of traditional tort concepts to a transportation decision is evident in *Toeller v. Mutual Service Casualty Insurance Co.*[37] In *Toeller* the public school district had contracted with

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[32] ILL. ANN. STAT. ch. 105, ¶ 5/24-24 (Smith-Hurd Supp. 1993). This statute deals with the status of public school personnel in handling discipline in the public schools and thus the reference to transportation is somewhat strained. For a discussion of the concept of in loco parentis, *see* Ralph D. Mawdsley, *In Loco Parentis: A Balancing of Interests*, 61 ILL. B.J. 638 (1973).

[33] Gerard v. Monrovia City Sch. Dist., 264 P.2d 115 (Cal. Ct. App. 1954).

[34] 407 So. 2d 759 (La. Ct. App. 1981).

[35] *Id.* at 763.

[36] For a discussion of many of the areas which tort liability touches in school management, most of which do not involve statutory mandates, *see* MAWDSLEY, LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS 1-64 (3d ed. 1995).

[37] 340 N.W.2d 923 (Wis. Ct. App. 1983).

a private bus company to provide bus transportation and thus the driver was not a school district employee. The bus driver in *Toeller* had reprimanded two students on his bus and informed them that they would not be permitted to ride the bus the next day. Neither the parents nor the school authorities were informed of the discipline and undisputed testimony indicated that such discipline under existing district policy was the province of the administrator rather than the driver. One of the boys did not tell his parents and the next day borrowed his brother's bicycle to ride to school; while en route he swerved into the path of a truck and suffered extensive head injuries. The bus driver, his contract employer, and his insurer were found ninety-three percent negligent on the theory that "a defendant's duty is established when it can be said that it is foreseeable that his act or omission may cause harm to someone."[38] While the school district had no liability in *Toeller*, the case nonetheless highlights the risk of liability where school district policy concerning the duty to provide transportation has been flagrantly violated.[39]

2. Bidding Transportation Services

Many school districts are no longer able or willing, because of limited finances or administrative difficulty in administering or scheduling buses, to maintain their own bus services and therefore they bid those services to private transportation contractors.[40] By statute in virtually every state, procedures have been established for the bidding of transportation contracts. While the specific language for bidding requirements varies from one state to another, generally, bidders must be "responsible" within the definition of the statute before their bids have to be considered.[41] Responsibility can relate to criminal activity of bus company employees. In New York, an appeals court has upheld a bidding contract provision imposing a two-year suspension from bidding competition on companies where employees had been convicted of a misdemeanor or

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[38] *Id.* at 925.

[39] Regarding a school district's authority to suspend rebellious students from bus service, *see* Rose v. Nashua Bd. of Educ., 679 F.2d 279 (1st Cir. 1982).

[40] The contracting of bus services does not absolve the school district of responsibility and liability if statutory safety standards are not complied with by the contractor. *See* Settles v. Incorporated Village of Freeport, 503 N.Y.S.2d 945 (Sup. Ct. 1986).

[41] *See* Ohio Bus Sales v. Toledo Bd. of Educ., 610 N.E.2d 1164, 1169 (Ohio Ct. App. 1992) ("it is the board's duty, not the trial court's duty [to decide] whether [a bidder is] the 'lowest responsible bidder' "). For a particularly expansive definition of "responsible bidder," *see* N.D. CENT. CODE § 15-34.2-08 (Supp. 1993) ("school board shall let the contract ... to the lowest responsible bidder who furnishes a bond ... and who agrees to use a vehicle which, in the judgment of the board, meets standards imposed by the superintendent of public instruction ..., is a safe comfortable and suitable vehicle for the purpose, and who names one or more drivers who, in the judgment of the board, are competent and responsible").

felony relating to pupil transportation services. This result was probably aided by the facts of the case where "the crimes were committed in the course of the employees' duties ... [in] small closely held corporations [which] ratified the illegal actions of their employees, who in two instances were close relatives of their principals, by either paying their legal fees and health benefits, retaining them as employees, or reemploying them in another company controlled by the same principal."[42] The opportunity to submit a bid does not rise to the level of an entitlement as to invoke the property interests protected by the Fourteenth Amendment.[43]

Litigation concerning bidding of transportation services can focus on a number of issues, one of which is access to information. Generally, all bidders are entitled to the same information from the school district so that all of the prepared and submitted bids address the specific services the district wishes to contract and represent competitive prices for performing those services. In *Willett Motor Coach Co. v. Board of Education of Chicago*,[44] an unsuccessful bidder on contracts for transportation of handicapped public school children had received the first solicitation of bids and the second amendment from the board. What the bidder did not receive, and what the board could not prove it had sent,[45] was a first amendment providing that either the board or the contractor could cancel all contract obligations on sixty-days notice. This amendment altered the terms of the first solicitation which had provided that only the board could cancel the contract on sixty-days notice. The unsuccessful bidder was able to secure an injunction ordering a new bidding process because the information in the first amendment would have provided him with leverage in negotiating a new contract with his union drivers. In addition, the unsuccessful bidder was able to prove that with knowledge of the sixty-days cancellation privilege his bid would in fact have been $1,000,000 lower than the bid accepted. In *M & M Bus Co. v. Muncie Community School Corp.*,[46] transportation bids had to be resubmitted where the school board had changed the rules to require an affirmative action plan without notifying two of the three bidders.

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[42] Positive Transp., Inc. v. City of N.Y. Dep't of Transp., 584 N.Y.S.2d 51, 52 (App. Div. 1992).

[43] *See* Rice v. Scott County Sch. Dist., 526 N.E.2d 1193 (Ind. Ct. App. 1988), *following* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). *But see* Scott v. Buhl Joint Sch. Dist. No. 412, 852 P.2d 1376 (Idaho 1993) (lowest bidder has property interest in award of contract and school board must afford lowest bidder due process if contract awarded to other than low bidder).

[44] 431 N.E.2d 1190 (Ill. App. Ct. 1982).

[45] This case is well worth reading regarding the importance of a regular routine in handling incoming mail and how such a routine is proved in a lawsuit. *Id.* at 1193-94.

[46] 627 N.E.2d 862 (Ind. Ct. App. 1994).

Failure of a board to furnish information to a bidder is actionable only if bidders are treated in an unequal manner. In *We Transport v. Board of Education of Uniondale*,[47] the failure of a board to furnish a copy of the current year's daily trip schedule was not an error since the daily trip schedules for the following year on which the bids were being submitted had not been made available to any of the parties. In *Dineen v. Town of Kittery*,[48] a school committee did not violate the statutory bidding process when it awarded a five-year contract even though the bidders had submitted only three-year bids where no evidence existed of "fraud, favoritism or corruption."[49] Likewise, acceptance of a bid with nonmaterial irregularities which could have been waived by the school district and which did not give one of the bidders "a substantial competitive advantage" was not reversible.[50]

Courts seem to grant considerable latitude to school boards in reviewing and selecting the low bidder. Courts may defer to the sound discretion of school boards in not submitting contracts for competitive bidding where a continuing emergency exists, such as the transportation of disabled children.[51] School boards may even be able to award contracts to a higher bidder where a thorough investigation casts doubt as to whether the low bidder can perform the contract in a safe manner.[52] A school board can permanently enjoin a school bus transportation company from discontinuing or interrupting certain school transportation services where the school board is exercising its "legal duty to modify its bid specifications as required by the public interests."[53] The key element always seems to be whether the action of the school board is made in good faith to promote the best interests of the school district, especially where the effect of the board's decision will be a saving to the taxpayers.[54] Generally, absent statutory authority to the contrary, the power of school board members to reject any and all bids cannot be questioned

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[47] 462 N.Y.S.2d 286 (App. Div. 1983).

[48] 639 A.2d 101 (Me. 1994).

[49] *Id.* at 102.

[50] Amboy Bus Co. v. Board of Educ. of N.Y., 618 N.Y.S.2d 799, 800 (App. Div. 1994).

[51] Positive Transp., Inc. v. City of N.Y. Dep't of Transp. 584 N.Y.S.2d 51 (App. Div. 1992).

[52] *See* Dineen v. Town of Kittery, 639 A.2d 101 (Me. 1994) (court approved selection of bid $30,000 per year higher than low bid).

[53] Board of Educ., Smithtown Cent. Sch. Dist. v. Bimco Indus., Inc., 444 N.Y.S.2d 718 (App. Div. 1981).

[54] State statutes usually require school boards to select the lowest bidders. *E.g.*, IND. CODE ANN. § 20-9.1-2-9 (West 1984) (contract "shall be awarded to lowest responsible bidder"); ILL. ANN. STAT. ch. 105, ¶ 5/10-20.21 (Smith-Hurd 1993) ("let all contracts ... to the lowest responsible bidder").

unless their action is arbitrary, capricious, or unreasonable.[55] A court's purpose in reviewing board rejection of bids is solely to determine whether "the board's decision is supported by substantial evidence ... and [whether] the board has complied with all relevant rules of law and procedure, including its own rules."[56] "The burden of proving that the administrative action of the School Board was arbitrary and capricious or an abuse of discretion falls upon the party attempting to upset the administrative order."[57]

While a school board cannot alter a bid for one of the bidders so as to give that bidder an advantage over others, a board does have some discretion in working with the successful bidder, once that determination has been made. Thus, issuance of a bid without requiring security from the successful bidder, at least in New York, is a matter of school board discretion.[58] In *Walt Bennett Ford v. Pulaski County Special School District*,[59] the low bidder was permitted, after bids were submitted but prior to awarding of the contract, to furnish proof that he was a franchised dealer and to prove that he was entitled to claim a five percent preference for Arkansas residents, both of which were statutory requirements. Although the Arkansas Supreme Court indicated that school board members could be sued individually for violation of the state's bidding requirements, the court found for the board and school district in this case because the action of the board and school officials "saved money for the taxpayers."[60] Had the contract not been offered to the low bidder as was required by the state statute, or had the outcome in this case been different, the board and school officials might have faced an action for tortious interference with contractual rights.

A school district's discretion notwithstanding, it must issue contracts consistent with the terms of the bid or face injunctive relief or damages. In *Willett Motor Coach Co. v. Board of Education of Chicago*,[61] a school bid solicitation called for bids by bus categories and provided that summer school service would be awarded to "successful bidders" of services for the regular school year. When Plaintiff was awarded a contract as a "successful bidder" for two of the bid regular year categories but later was denied the summer service contract in the same categories, the company filed suit and collected damages for breach of contract. The state

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[55] *See* 64 Am. Jur. 2d *Public Works and Contracts* §§ 75, 76.

[56] Metropolitan Sch. Dist. of Martinsville v. Mason, 451 N.E.2d 349 (Ind. Ct. App. 1983).

[57] *Id.* at 354.

[58] Wilson Omnibus Corp. v. Fallsburg Cent. Sch. Dist., 563 N.Y.S.2d 365 (App. Div. 1990).

[59] 624 S.W.2d 426 (Ark. 1981).

[60] *Id.* at 429.

[61] 524 N.E.2d 107 (Ill. App. Ct. 1988).

appeals court reasoned that once the bus company became a "successful bidder" under the terms of the regular year contract, and by definition a "responsible bidder" under the state statute,[62] the board had to offer the same bidder the summer school transportation service contract in the same categories that the regular year contract had been offered.

Renegotiation of a transportation contract may be permitted by state statute without the requirement that bids be resubmitted, even though the renegotiated contract occurred after the successful bidder had been selected. But the range of topics that can be the basis of renegotiation without the resubmission of bids may be narrowly defined by the statute. Indiana statute provides that:

> The governing body may require the school bus driver or fleet contractor to furnish equipment with greater seating capacity at any time. When a school bus driver or fleet contractor is required to furnish different equipment during the term of the contract, the contracting parties may mutually agree to the cancellation of the existing contract, and renegotiation of new contract for the balance of the term under the original contract.[63]

In *Jackson v. Union-North United School Corp. Board of Trustees*,[64] a school district had renegotiated six contracts based on the purchase of new buses with the same seating capacity as the buses owned by the contractor at the time the contractor's transportation bid had been accepted. The Indiana Court of Appeals interpreted narrowly its statute and limited renegotiation without resubmission of bids only to situations where school boards require buses with seating capacities different than the original contract. Although *Jackson* was appealed after a summary judgment for the school district, the appeals court's unequivocal interpretation of the state statute and the school district's apparent violation of the statute seemed to indicate that the trial court on remand would be expected

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[62] *See* ILL. ANN. STAT. ch. 105, ¶ 5/10-20.21 (Smith-Hurd Supp. 1993). Illinois is consistent with most states in requiring that a bidder to whom a contract is submitted must be "responsible," which goes beyond the monetary amount of a company's bid, and considers also financial solvency and ability to perform the contract in a timely and responsible manner.

[63] IND. CODE ANN. § 20-9.1-2-13 (West 1984). Indiana also permits alteration of existing contracts to pay additional compensation to bus drivers where a bus route is longer than the originally contracted route (§ 20-9.1-2-12) and permits emendation of an original contract where adjustments are needed due to fluctuations in the cost of fuel (§ 20-9.1-2-13.5).

[64] 582 N.E.2d 854 (Ind. Ct. App. 1991).

to enter judgment against the school district, and thus the district would have to resubmit contracts for rebidding.[65]

Failure of a school district to rebid on an option extension of an existing contract may also run afoul of the state's bidding requirements. In *Edwards v. City of Boston*,[66] the city had a one-year contract with a private bus contractor to provide transportation services with a one-year extension at the option of the city. Failure of the city to solicit bids for the extension year was held to be a violation of the state's Uniform Procurement Act.[67]

The bidding authority carries the responsibility to monitor satisfactory compliance with state statutes and the terms of the contract. Thus, a school board can rescind a transportation contract when it learns that the successful bidder was not a "responsible bidder" within the terms of the statute due to a prior criminal conviction of its principal member. Such a board determination was held to have a rational basis.[68] In addition, a school board can rescind a contract where state inspections showed bus defects that could have been eliminated by proper maintenance and the contract had placed the responsibility for such maintenance on the contractor.[69]

3. Alternate Means of Transportation

a. *Public Transportation*

Not all school children are transported to school by school buses owned by the school district or contracted with private bus contractors.[70] The tendency for school districts in larger cities with mass bus transportation to designate such transportation for student use has raised a number of interesting legal questions. The difficulties in reconciling the use of mass transportation to transport students with statutory provisions that require school buses to meet a host of special safety specifications, such

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[65] A strong dissent in *Jackson* rejected the narrow interpretation of the state statute and read two, instead of one, areas of discretion where school boards could renegotiate transportation contracts: "seating capacity" and "different equipment." Also, the dissenting justice disputed whether the majority's assumption that the new buses were not required by the school district could be resolved at all at the appeals court level when that issue had not been raised at the trial by either party. *Id.* at 859-60.

[66] 562 N.E.2d 836 (Mass. 1990).

[67] MASS. GEN. LAWS ANN. ch. 30B, § 1 *et seq.* (West 1992).

[68] Crescent Bus Corp. v. Board of Educ. of N.Y., 463 N.Y.S.2d 259 (App. Div. 1983).

[69] Childress v. Sullivan County Bd. of Educ., 771 S.W.2d 411 (Tenn. Ct. App. 1988).

[70] Use of independent contractor bus services may have an advantage where a driver employed by that company violates a statute imposing strict liability. School districts may not be vicariously liable in such situations. *See* Chainani v. Board of Educ. of N.Y., 608 N.Y.S.2d 283 (App. Div. 1994).

as color and special flashing lights, surfaced in *Metropolitan Atlanta Rapid Transit (MARTA) v. Tuck*.[71] The Atlanta school board had contracted with MARTA to alter one of its normal daily runs to transport students to and from public schools from designated drop-off or pick-up points. Even when the MARTA bus was carrying school children pursuant to this arrangement, it was still part of the MARTA system and members of the public could ride the bus. No changes had been made to the MARTA bus to cause it to look like a traditional school bus when students were being transported. After a child disembarking from the MARTA bus ran in front of the bus and was struck by a car, the parents brought suit against MARTA alleging that their bus was not identified as a school bus as required by state statute. Not only did the Georgia Court of Appeals determine that the MARTA bus was a school bus within the meaning of the statute, but it decided that operating the bus on a special bus route without displaying the required sign was negligence per se. Although neither the school board nor school officials were parties to this lawsuit, presumably because they had no notice that the bus was in violation of state law,[72] the prospect for future litigation would have probably been fairly good, had not the Georgia legislature taken prompt action to exclude all local transit systems from all identification and equipment requirements for school buses.[73]

In a more recent Minnesota case, however, a public school district was directly involved in litigation concerning the use of public transit buses as school buses. In *Jam v. Independent School District No. 709*,[74] a school district was a Defendant in a wrongful death action where a student had been killed while crossing a street after having been discharged from a Duluth Transit Authority (DTA) bus which was used to transport children to a junior high. Even though the DTA bus was theoretically open to the general public and the deceased child who lived within the two-mile maximum walking distance had to pay his own fare, the DTA bus was determined nonetheless to be a school bus within the statutory definition because the ridership was exclusively students, the bus operated on scheduled bus routes, and it stopped at places not designated as public bus stops. In overturning a summary judgment for the school district, the court ruled that a question of fact was raised since the injury suffered by the child was precisely the type of harm envisioned by state

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[71] 292 S.E.2d 878 (Ga. Ct. App. 1982).

[72] For liability of school boards for actions of those with whom it contracts, *see* Settles v. Incorporated Village of Freeport, 503 N.Y.S.2d 945 (Sup. Ct. 1986) and Peters v. Wayne State Univ., 691 F.2d 235 (6th Cir. 1982).

[73] *See* GA. CODE ANN. §§ 40-8-110—40-8-115 (1994).

[74] 413 N.W.2d 165 (Minn. Ct. App. 1987).

statutes that established requirements for school bus color, signaling arm, and flashing lights.

Pennsylvania appears to have adopted by statute a position somewhere between the Minnesota and Georgia cases discussed above. Pennsylvania provides that "[b]uses, other than school buses, operated by urban mass transportation for the exclusive or nonexclusive transportation of school children may, at the option of the urban mass transportation system, be equipped with flashing red and amber lights and may be identified by appropriate labeling as carrying school children."[75]

b. *Private Taxi Companies*

In transporting certain categories of students, especially those with disabilities, some school districts contract with private taxi companies. Even though services are being provided to students, taxis do not serve large numbers of students like buses. In *S.H. v. State*,[76] the Utah Supreme Court refused to impose liability on a school district for the sexual molestation of a disabled child by a taxi driver. The majority found the district immune under a statutory provision imposing immunity for acts arising out of assault and battery.[77] However, the reasoning of a vigorous dissent is worthy of note as it reflects on legislative policy. "It is indefensible for a child who is injured by a negligently hired cab driver to be able to recover from the State for an injury caused by the cab driver's negligently colliding with another automobile but not to be able to recover when that contractor assaults the child."[78]

c. *Private Automobiles*

A persistent problem for school authorities has been the use of private cars for school and school-related functions. Not surprisingly, injured plaintiffs have sought to extend their reservoir for financial recovery of judgments to the liability insurance coverage of the school district. In *Caston v. Buckeye Union Insurance Co.*,[79] an injured plaintiff was able to satisfy the bulk of his $314,650 judgment against the school's insurer because the private car in which the plaintiff had been injured was considered to be a "hired automobile." In *Caston*, the person in charge of a field trip had asked for volunteers to drive their family cars. Once at the field trip destination a driver and plaintiff received permission to leave and get a hamburger; the accident occurred en route. The court categori-

[75] PA. STAT. ANN. tit. 75, § 4553 (Supp. 1994) (if equipment or labeling is used as authorized by statute, it must comply with state law).
[76] 865 P.2d 1363 (Utah 1993).
[77] UTAH CODE ANN. § 63-30-10(2) (1993).
[78] *S.H.*, 865 P.2d at 1366.
[79] 456 N.E.2d 1270 (Ohio Ct. App. 1982).

cally rejected the argument that the trip to get a hamburger was a frolic and instead relied on the following language in the school's insurance policy:

> Insured means ... (c) any other person while using an owned automobile or a hired automobile with the permission of the named insured, provided his actual operation ... is within the scope of such permission. ... Hired automobile means an automobile not owned by the named insured which is used under contract in behalf of, *or loaned to*, the named insured....[80]

Two factors seemed to satisfy the court that the student's car was a "hired automobile": the car was being used as a substitute vehicle for school buses which were not available for the field trip; and the school official had made a request for volunteers.

Normally, the mere fact that students use their own cars for a school-sponsored activity does not in itself generate liability.[81] However, a school can be liable if it provides transportation but an exception is made for one student[82] or if a student's unauthorized use of his car is known by school officials.[83]

Very probably in response to concerns regarding school district liability for the use of private vehicles, a South Carolina vocational center adopted a Driving/Riding Policy which required parental permission before students would be permitted to drive or ride in cars from the high school to the vocational center, rather than use the bus provided by the school district. In rejecting a tort claim by a student injured in an automobile accident during a week when the school failed to check the passes issued pursuant to parental permission, the South Carolina Supreme Court tacitly upheld the policy while finding the failure to check passes for one week not to be gross negligence so as to waive governmental immunity.[84]

However, failure of a school to enact a driving policy should not necessarily create liability. In *Capuzzi v. Heller*,[85] Plaintiffs injured as a result of two vo-tech uninsured students racing in their cars between the

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[80] *Id.* at 1271 (emphasis in original).

[81] Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979); Rauls v. Dugas, 398 So. 2d 630 (La. 1981).

[82] Williamson v. Board of Educ. of Berne-Knox, 375 N.Y.S.2d 221 (1975).

[83] Sumter County v. Pritchett, 186 S.E.2d 798 (S.C. 1971).

[84] Richards v. Hambright, 374 S.E.2d 296 (S.C. 1988).

[85] 558 A.2d 596 (Pa. Commw. Ct. 1989).

high school and the vo-tech school unsuccessfully alleged school district immunity waiver under either "negligent entrustment" or "employee" theories.[86] In denying recovery, the court found that the power of the school district to refuse students to drive cars does not equate to negligently entrusting the students' own cars to themselves and the lack of any control by the district over student operation of their cars obviates any possibility of an employment relationship.

Likewise, permitting students to commute between a high school and a vocational center during the school day created no duty on a school district to supervise the student's driving. In *Wickey v. Sparks*,[87] a high school permitted students to drive from a high school to a vocational center, after having secured parental permission, and had established rules in a handbook requiring students to return to the high school by a certain time during the day and to use a particular highway. Although the assistant principal had received complaints regarding horseplay of the students while driving, the school took no measures to supervise the students or to verify that the students were following the prescribed route. A driver struck by one of the students driving between sites was injured and sued the school district on the theory that the school district owed a duty to supervise student driving behavior. In upholding dismissal of the complaint, the state court of appeals determined that the students driving between classes during the school day "did not create a foreseeable risk to [plaintiff] any more than if [the student], or any other licensed driver, had been driving on the public highway at any other time for any other reason."[88] In addition, the court observed as a matter of public policy that "school authorities should not be liable for injuries caused by their students' negligent acts which occurred off of school premises."[89]

At least one state, Florida, has approached the problem of the use of private cars from a different perspective. Rather than having to await judicial determination as to whether a private vehicle is being used for school business, the Florida legislature has accorded "parents, guardians or other responsible adults who provide transportation in privately owned vehicles ... the same exposure to, and protection from, risks of personal liability as do school district employees acting in the scope of their employment."[90] However, this provision applies only where the function

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[86] The Pennsylvania immunity statute exceptions were not at all supportive of plaintiffs' position. *See* PA. STAT. ANN. tit. 42, §§ 8501 (employee a person "acting on behalf of a government unit") and 8542(b) ("operation of any motor vehicle in the possession or control of the local agency") (West 1982).

[87] 642 N.E.2d 262 (Ind. Ct. App. 1994).

[88] *Id.* at 267.

[89] *Id.*

[90] FLA. STAT. ANN. § 234.02(3) (West Supp. 1994).

for which the car is used is "not part of a scheduled series or sequence of events to the same location," school bus transportation is not available, and parents have given written consent.[91] While this type of statute would probably not resolve the student accident cases presented above, the statute should have the salutary effect of encouraging "responsible adults" to volunteer their time—and automobiles—to assist financially strapped schools in providing activities external to the school.

Because of the expense and inconvenience of using buses on field trips and the undesirability of using private cars, some schools have turned to leasing or renting vans for such trips. Even this alternate transportation option is not without difficulties. In *Whittington v. Sowela Technical Institute*,[92] a husband, in a wrongful death action on behalf of himself and his minor son, was able to recover a judgment in excess of $300,000 against the school where his deceased wife had been a nursing student, as well as the school's liability insurer. The feature which has made this case so significant is that the death occurred on a field trip for which the school had rented a van that carried its own liability insurance. In this case the deceased student had participated in a one-day hospital field trip that was virtually mandatory and for which each student received twelve hours of credit. The school (Sowela) placed certain restrictions on field trips: the trip had to have an educational purpose relating to nursing; travel had to be done on a Friday and had to be completed in one day; the students could not travel in their private vehicles; and the trip had to meet with the approval of Sowela. Prior to departure on the field trip each student including the deceased had completed the following "release" form:[93]

Sowela Technical Institute
Practical Nursing Department

I, Wanda Whittington, voluntarily agree to participate in the following activity:

List activity: M.D. Anderson Senior Trip
Place: Houston, Texas
Date: 4-6-79

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[91] FLA. STAT. ANN. § 234.02(2)(b) (West Supp. 1994).

[92] 438 So. 2d 236 (La. Ct. App. 1983).

[93] *Id.* at 242. The court's discussion of the enforceability of the release is well worth reading, since under Louisiana law a release is considered to be a contract and this release was unenforceable because "the parties were not dealing at arm's length and upon an equal footing." For discussions of exculpatory documents, *see* Henderson, Golanda, and Lee, *The Use of Exculpatory Clauses and Consent Forms by Educational Institutions*, 67 EDUC. L. REP. 13 (1991); MAWDSLEY, LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS 3-8 (3d ed. 1995).

and hereby relieve Sowela Technical Institute of any and all liability associated with the above.

s/ Wanda Whittington
Name

4-2-1979
Date

In preparation for the trip, one of the instructors, Jean Teel, rented a van from a local rental company, signed in her own name as the customer and paid for all the charges; Sowela received no bills. The rental company's contract provided:

> Customer is covered by an automobile liability insurance policy with limits of liability for bodily injury including death to the GREATER OF:
> a) The limits of liability under the Customer's personal automobile liability insurance policy in force as of the date of the execution of this Agreement, or
> b) The statutory limits prescribed under the Financial Responsibility Law or other applicable statute of the state in which the Vehicle is rented.
>
> PROVIDED HOWEVER that such limits shall not exceed $100,000.00 for each person and $300,000.00 for each accident and property damage of $25,000.00 for each accident. A copy of said policy is available for inspection at the main office of Lessor ...[94]

Plaintiff in this case sought recovery from the rental company on the basis of the contract for the rental vehicle signed by Jean Teel and from the school on the theory that Jean Teel, in renting the van, was only an agent for the school. The trial court determined that Jean Teel's personal automobile liability insurance coverage was $10,000 and therefore under the rental company contract, the company's liability was limited to that sum. In determining that the instructor, Jean Teel, was an agent for the school in renting the van, the court focused on the facts that twelve academic credits had been awarded for a trip that was far from voluntary and the expenses incurred by Teel and the other instructor on the trip had been reimbursed by the school. In holding the school to be independently negligent, the court declared that "Sowela owed a duty to its students to provide transportation under safe conditions."[95] That duty had been

[94] *Id.* at 243
[95] 438 So. 2d at 247

breached because the school (through its agent) had permitted sixteen students and two instructors to be transported in a van designed to hold fifteen persons over a highly traveled interstate highway for a great distance. In addition, the school, by permitting the instructors to drive the van, had not "properly fulfilled its duty of providing a trained driver, e.g. a licensed chauffeur...."[96]

Whittington has elements that are troublesome for school districts and school officials. Two of the commonly stated reasons for using rental vehicles for school functions are to eliminate the high cost of professional licensed drivers and to pass on the insurance risk to the rental company's insurer. As is clearly indicated in *Whittington*, rental companies can successfully reduce their insurance exposure by tying the rental vehicle's liability coverage to that of the person contracting for the vehicle. Unless the school district wants to contract directly for all rental vehicles, the best strategies to avoid the liability insurance exposure evidenced in *Whittington* would seem to be either to make certain the person renting the vehicle has adequate liability on his/her personal vehicle or to require persons renting vehicles for school functions to contract for the extended liability coverage provided by all rental companies. But the more troublesome aspect of *Whittington* is "the duty [of schools] to provide a driver qualified and trained in transporting a large group of students over a long distance on a heavily traveled interstate highway."[97] To the extent that this duty becomes generally recognized, the school districts face a number of options in managing field trips, all of which may be undesirable: bearing the higher cost of using a bus and a trained driver; using a number of private vehicles with the students as drivers; or not scheduling, or canceling, the field trip.

4. Bus Driver Requirements

The responsibility which school boards have to monitor school transportation involves also the obligation to check bus driver compliance with state requirements. All states require bus drivers to meet special qualifications set either by statute[98] or state department of education regulations.[99] Some of the litigation in this area involves attempts by state licensing agencies to suspend or revoke bus driver licenses. State licensing agency decisions to revoke licenses of bus drivers have been upheld

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[96] *Id.*

[97] *Id.*

[98] *E.g.*, IOWA CODE ANN. § 321.376 (West Supp. 1994) (bus drivers have special license endorsement); IND. CODE ANN. § 20-9.1-2-10 (West 1984) (driver must have public passenger chauffeur's license).

[99] *E.g.*, IOWA CODE ANN. §§ 285.5(2), 285.8(6)(f) (West 1988).

on the grounds that the driver had a history of diabetes[100] or myocardial infarction,[101] that the driver had been convicted of a felony related to his license,[102] and that he had reached the age of sixty-five.[103] The Eighth Circuit has held that disqualification of Type II insulin-using persons from being bus drivers does not violate section 504 of the Rehabilitation Act. Persons with this condition were not "otherwise qualified" for whom reasonable accommodations could be made because of increased risk of loss of vision or blurred vision and sudden unconsciousness.[104]

Passage of the Omnibus Transportation Employee Testing Act of 1991[105] and accompanying federal regulations[106] pertaining to mandatory alcohol and drug testing of bus drivers has established minimum standards across the country. Effective January 1, 1995, for employers with more than fifty employees and January 1, 1996, for employers with fewer than fifty such employees,[107] bus drivers are required to have a commercial drivers' license and preemployment/pre-duty tests for alcohol and five drugs[108] are also required. In addition, tests are required: following an accident where there has been loss of life or citation for a moving violation; on a random basis; and where there is reasonable suspicion based on specific, contemporaneous, articulable observations concerning appearance, behavior, speech or body odors.[109] The federal

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[100] Jackson v. State, 544 A.2d 291 (Me. 1988); Commonwealth v. Slater, 462 A.2d 870 (Pa. Commw. Ct. 1983). *But see* Commonwealth v. Brown, 630 A.2d 927 (Pa. Commw. Ct. 1993) (even though state need have only rational basis for its policy on license revocation on basis of diabetes, state creation of irrebuttable presumption that person who had one seizure is incompetent to drive a bus for one year violates procedural due process).

[101] Huntsberger v. Commonwealth, 463 A.2d 1288 (Pa. Commw. Ct. 1983); Commonwealth, Dep't of Transp., Bureau of Traffic Safety v. Johnson, 489 A.2d 960 (Pa. Commw. Ct. 1985). *Contra* Appeal of Stober, 546 A.2d 155 (Pa. Commw. Ct. 1988) (section 504 of Rehabilitation Act applied to Department of Transportation's regulations requiring revocation of license of driver with myocardial infarction; state failed to meet burden that driver was incompetent as driver); Commonwealth, Dep't of Transp., Bureau of Driver Licensing v. Chalfant, 565 A.2d 1252 (Pa. Commw. Ct. 1989) (evidence of one seizure not sufficient to prove incompetence for license recall).

[102] Gibson v. Transportation Comm'n, 315 N.W.2d 346 (Wis. 1982) (armed robbery).

[103] Maki v. Commissioner of Educ. of N.Y., 568 F. Supp. 252 (N.D.N.Y. 1983), appeal dismissed 742 F.2d 1437 (2d Cir. 1984). *But see* Ten Hoeve v. Board of Educ. of Dundee Cent. Sch. Dist., 489 N.Y.S.2d 59 (N.Y. 1985) (school board policy of dismissing bus drivers at age 65 violative of federal and state handicapped acts); Gilmore v. West Virginia Dep't of Educ., 445 S.E.2d 168 (W. Va. 1994) (ADEA claim dismissed after West Virginia had abolished its regulation decertifying bus drivers at age 70).

[104] Wood v. Omaha Sch. Dist., 25 F.3d 667 (8th Cir. 1994).

[105] 49 U.S.C. § 1618a (Supp. 1994).

[106] 49 C.F.R. §§ 40.1-40.83 (1994).

[107] 59 Fed. Reg. 42996 (Aug. 19, 1994) (Rules became effective Sept. 19, 1994).

[108] 49 C.F.R. § 40.21 (the five drugs are marijuana, cocaine, opiates, amphetamines, and phencyclidine [PCP]).

[109] 49 C.F.R. §§ 1618a, 2717(b)(1) (Supp. 1994).

regulations provide that employees who have engaged in a prohibited activity may be required to undergo regular testing after return to the job.[110]

School boards frequently become defendants when they seek to suspend or dismiss drivers who have been guilty of misconduct or who have violated an established state standard.[111] Generally, courts appear to give great deference to the decisions of school boards. In one interesting case, a dismissed bus driver even attempted to sue (unsuccessfully) his union when the union had failed to file a grievance on his behalf.[112] A bus driver dismissal has been upheld where the driver failed "to keep his school bus in a safe, comfortable, and practical operating condition" by not keeping the bus adequately repaired and by not furnishing adequate heat on cold days.[113] In addition, driver dismissals have been upheld for sexual harassment of children on the bus,[114] failure to secure medical treatment for carpal tunnel syndrome which prevented a driver from performing assigned duties,[115] conviction of a felony within the previous five years,[116] conviction of driving under the influence,[117] use of physical force against students,[118] growing marijuana on own property,[119] letting children off at the wrong location,[120] changing the order of bus stops,[121] and for a single accident where the driver failed to yield the right-of-way.[122]

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[110] 49 U.S.C. § 1618a(f) (Supp. 1994) (if prescribed by the employer's substance abuse professional, the employee must undergo a minimum of six tests in the first 12 months and may be required to undergo tests for up to 60 months).

[111] *See, e.g.*, Becker v. Churchville-Chili Ctr. Sch. Dist., 602 N.Y.S.2d 497 (Sup. Ct. 1994) (bus driver successful in action to remove from his personnel file a reprimand for sexual harassment); Atkins v. School Comm'rs of Indianapolis, 830 F. Supp. 1169 (S.D.Ind. 1993) (refusal of African-American bus driver to take drug test as permitted by state statute a nondiscriminatory reason under title VII for discharge).

[112] Stempien v. Civil Serv. Employees Ass'n, 458 N.Y.S.2d 381 (App. Div. 1982).

[113] Sampson v. Administrator, La. Office of Employment Sec., 439 So. 2d 458 (La. Ct. App. 1983).

[114] Green v. Board of Sch. Comm'rs of Indianapolis, 716 F.2d 1191 (7th Cir. 1983). *See also* Raphael v. Lakeland Cent. Sch. Dist., 609 N.Y.S.2d 254 (App. Div. 1994) (bus driver suspended with pay after being charged with sexual abuse could not sue school district following acquittal on theory that district knew of boy's psychological problems causing him to lie).

[115] Bernard v. Avoyelles Parish Sch. Bd., 640 So. 2d 321 (La. Ct. App. 1994).

[116] Hill v. Gill, 703 F. Supp. 1034 (D.R.I. 1989).

[117] Patton v. Springfield Bd. of Educ., 531 N.E.2d 310 (Ohio 1988).

[118] Heslop v. Board of Educ., Newfield Cent. Sch. Dist., 594 N.Y.S.2d 871 (App. Div. 1993).

[119] Holsapple v. Arlington Cent. Sch. Dist., 523 N.Y.S.2d 600 (App. Div. 1988).

[120] Tyson v. Hess, 498 N.Y.S.2d 778 (Ct. App. 1985).

[121] Brigandi v. Board of Educ., Deer Park Union Free Sch. Dist., 500 N.Y.S.2d 740 (App. Div. 1986).

[122] Ivy v. Natchitochos Parish Sch. Bd., 428 So. 2d 1332 (La. Ct. App. 1983).

However, a bus driver's dismissal can be set aside if a court finds that the penalty to be disproportionate to the alleged improper conduct.[123] In addition, school district rules enforceable against drivers may be modifiable by collective bargaining.[124] The issue of drug testing for bus drivers has become controversial, and a determination as to whether school boards have to have probable cause prior to testing may well affect the outcome of such testing.[125]

Bus driver terminations may also implicate constitutional issues. In *Robbins v. Malone Central School District*,[126] a bus driver dismissal for inappropriate supervision and discipline of students on his bus was not entitled to a full due process evidentiary hearing on the ground that his collective bargaining agreement gave him a right to continued employment. The bus driver was entitled only to procedures provided under the collective bargaining agreement, which admittedly were less than a full evidentiary hearing. In *Reidenbach v. U.S.D. No. 437*,[127] a nonrenewed bus driver stated a section 1983 free speech cause of action where nonrenewal had occurred after she had complained about overcrowding on the school buses. The court reasoned that the school district's decision to terminate "violated her clearly established First Amendment right not to be terminated because she spoke out on a matter of public concern."[128]

C. Care Owed to Students During Transportation

1. Selection of Bus Stops

Schools have responsibilities for students in a wide range of transportation situations from selection of bus stops to disembarkation. The extent to which responsibilities will be translated into school district liability depends on a number of variables.

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[123] Ross v. Oxford Academy and Cent. Sch. Dist., 590 N.Y.S.2d 552 (App. Div. 1992) (dismissal of bus driver as result of using physical force on four students reversed where driver had 15 years of good evaluations and evidence was uncontradicted regarding "difficult nature of the children").

[124] Newark Cent. Sch. Dist. v. PERB, 610 N.Y.S.2d 134 (1994) (state statute prohibiting smoking on buses while actually being used to transport students did not prohibit bargaining as to times when students were not on buses).

[125] *See* Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986) (dismissal of bus driver on basis of unconfirmed urinalysis test secured without probable cause of abuse held to be arbitrary and capricious).

[126] 581 N.Y.S.2d 493 (App. Div. 1992).

[127] 878 F. Supp. 178 (D. Kan. 1995).

[128] *Id.* at 181. The "public concern" limitation on free speech protection for public employees has developed from Connick v. Myers, 461 U.S. 138 (1983) (questionnaire circulated by assistant district attorney to other employees about office morale did not concern a matter of public concern and therefore discharge of employee not protected under free speech).

Litigation concerning selection of bus stops has generated a variety of concerns. In *Brooks v. Woods*,[129] a bus stop was established and designated by the school district adjacent to an uncurbed, five-lane traffic artery with a 45 mph speed limit. The school bus arrival coincided with the normal rush hour traffic. The Plaintiff, a child struck and injured by a car while waiting for the school bus, "was a quiet nine-year-old having the skills and capacity of a child of only six years."[130] The trial court granted the school district's demurrer, inferentially holding that the district had "no legal duty to the child under the facts."[131] In overruling the trial court the appeals court held "that a school district's legal duty to exercise reasonable care extends to any activity of school bus transportation which lies outside the control of the parents."[132] The *Brooks* appeals court further noted that a school district "must provide a reasonably safe bus stop where children may wait for the bus with reasonable safety, having due regard for their age, immaturity and inexperience."[133] Similarly, in *Duval County School Board v. Dutko*,[134] a school district was liable for a $175,000 damage award for the death of a twelve-year-old student where the district had continued to maintain a bus stop at the same location, despite prior near misses and the absence of any traffic signals, signs, markers or barriers designating the area as a school bus stop. In another case, a material issue of fact was raised regarding the selection of a bus stop where the school district knew most disembarking students would have to cross a railroad track and where an alternative disembarkation location existed which did not require the students to cross the tracks.[135]

Liability for selection of bus stops will depend to a large extent on the facts of each case, but generally a school district will not be liable if "the placement of [a] school bus stop was not unreasonably dangerous."[136] In *Hackler v. School District No. 500 of Kansas City*,[137] a school district had no liability for a student injury where parents had been requested to select the bus stop on the same side of the road nearest their home and the bus driver had no knowledge the parents of the injured child had

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[129] 640 P.2d 1000 (Okla. Ct. App. 1981).

[130] *Id.* at 1001.

[131] *Id.*

[132] *Id.* at 1002.

[133] *Id. See also* School Bd. of Broward County v. Surette, 394 So. 2d 147 (Fla. Dist. Ct. App. 1981) (school district liable for maintaining a bus stop near a vacant lot with an overgrown and debris-strewn lawn that obscured the waiting children from approaching motorists).

[134] 483 So. 2d 492 (Fla. Dist. Ct. App. 1986).

[135] Garrett v. Grant Sch. Dist. No. 124, 487 N.E.2d 874 (Ill. App. Ct. 1985).

[136] Mashier v. Phoenix Cent. Sch. Dist., 605 N.Y.S.2d 581, 582 (App. Div. 1993). *See also* Smith v. Weber County Sch. Dist., 877 P.2d 1276 (Utah Ct. App. 1994) (school district immune for negligent design of bus stops).

[137] 777 P.2d 839 (Kan. 1989).

selected a bus stop across the street from their home. The Oklahoma Court of Appeals applied and extended *Hackler* to a fact situation of first impression by finding that a school district had no duty to select bus stops on the same side of the street where the bus stopped. In fact, the court found the parent responsible for failing to prevent the child from attempting to cross the street prior to arrival of the bus.[138] The Michigan Court of Appeals interpreted its tort immunity statute to grant immunity to a school district where selection of a bus stop on the side of the road opposite their home was not "the proximate cause"[139] of children being struck by a motorist. In this case, the car that struck children was ahead of the bus and nothing the school district could have done would have eliminated the injury. But the court in *Harrison v. Escambia County School Board*,[140] was far more explicit regarding the policy issues pertaining to selection of bus stops. In *Harrison*, a child had been struck and killed while walking along a busy street to a school bus stop. Plaintiffs pleaded breach of a Florida statute as the basis of their negligence complaint.

> Each district school board shall establish school bus stops as necessary at the most reasonably safe locations available. Where unusual traffic hazards exist at school bus stops on roads maintained by the state outside of municipalities, the Department of Transportation, in concurrence and cooperation with and upon request of the district school board, shall place signs at such bus stops warning motorists of the location of the stops.[141]

The gravamen of the complaint in *Harrison* was that the school board failed to direct warning signs to be placed near the bus stop or to find an alternate safe bus stop. In sustaining the trial court's demurrer to the complaint, the state court of appeals found the determination of bus stops to be a discretionary function and thus protected by governmental immunity. However, in affirming dismissal of the complaint the court made some practical policy observations.

> It appears to us that to require the school board to decide on school bus stop locations under the threat of tort liability in the event a judge or jury at some later

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[138] Stokes v. Tulsa Pub. Sch., 875 P.2d 445 (Okla. Ct. App. 1994).
[139] MICH. COMP. LAWS ANN. § 691.1407 (West 1987). Dedes v. South Lyon Community Sch., 502 N.W.2d 720 (Mich. Ct. App. 1993).
[140] 419 So. 2d 640 (Fla. Dist. Ct. App. 1982).
[141] FLA. STAT. ANN. § 234.112 (West 1989).

> date might determine that the chosen location constituted a safety hazard to an individual child injured enroute to it, would present some difficulties. It is obvious that some potential for injury to a child would exist at any location where motor traffic exists yet it would be totally impractical and indeed impossible to locate a bus stop at any place where this would not be true. Furthermore, a location deemed 'most reasonably safe' for some could pose safety problems different in kind and degree for other pupils, given the fact that they very likely approach the bus stop from different directions, and by different routes. Finally, one might easily conclude that the safety of each child could be insured to the utmost only by requiring the bus to stop at each child's home, yet it is equally apparent that this would be totally impracticable because of other factors, such as the length of time the children would be required to endure the bus ride, the potential for increased traffic congestion owing to excessive bus stops, and the increased hazards generated by the bus leaving and re-entering well-traveled routes, to name but a few.[142]

While the opinion expressed in the quotation above may have the appearance of being distant and aloof from the very personal and sensitive issue of student safety, the court does express clearly the practical difficulties in balancing a school district's duty to provide transportation with choices that must be made in implementing that duty. Schools have generally never been found to be insurers of the safety of students.[143] Thus, a New York school district did not breach its duty of care when a schoolgirl, who had missed the bus at her regular stop, was struck and injured hurrying to catch the same bus at a later stop. The school district practice of permitting students to catch a bus at a later stop could not be the basis for liability in this case because the district had never communicated the practice to the public so as to form the basis of parent/student reliance.[144] However, a New York court, in a more recent decision involving a student who was injured attempting to cross a busy street to catch a bus at an undesignated bus stop, carefully crafted a distinction between no liability for a school district which was unaware of the

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[142] *Harrison*, 419 So. 2d at 644.

[143] *See generally* MAWDSLEY, LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS 8-9 (3d ed. 1995); VALENTE, EDUCATION LAW: PUBLIC AND PRIVATE, II, 198-209 (1985).

[144] DiCerbo v. Raab, 516 N.Y.S.2d 995 (App. Div. 1987).

undesignated bus stop and liability for the bus carrier whose driver had been stopping for two years along a heavily traveled highway with a 55 mph speed limit.[145] The court reasoned that without a special relationship between the school district grounded in knowledge that students were boarding a bus at an undesignated bus stop, the district's selection of a bus stop was protected by immunity as performance of a governmental function. On the other hand, the case was remanded to the trier of fact as to the bus carrier because "a trier of fact could find that a reasonably prudent school bus operator would not have engaged in [the practice of picking up students alongside a busy highway] because of the obvious risk it presented to children attempting to cross ... a heavily traveled highway with a 55-mile-an-hour speed limit."[146]

Selection of a bus stop also raises the question regarding school district responsibility for the safety of students gathered there. In *Fornaro v. Kerry*,[147] a kindergarten student waiting for his bus and struck in the face by a rock thrown by an older ten-year-old boy, also waiting at the same bus stop for a separate elementary school bus, failed in his allegation that the school district owed a duty not to have students of different ages waiting at the same bus stop because "the students were not yet in the physical custody or control of the school district."[148] However, in *O'Campo v. School Board of Dade County*,[149] a school district was not entitled to summary judgment where an eleven-year-old girl was raped waiting at a bus stop assigned by the school to catch a bus at 6:55 a.m. to a special arts program for gifted children. The court reasoned that the school district owed a duty to children entrusted to its care, in this case a child waiting where the district instructed her to wait, and the district may have breached that duty when it failed to provide any supervision at all at the bus stop.

Responsibility to provide a safe bus stop cannot be eliminated simply because proximate cause of injury to students crossing a busy street to the bus stop may have been attributed to the driver of the vehicle striking the students, as well as to the school district. In *Dedes v. Asch*,[150] a school district argued unsuccessfully that statutory governmental immunity for conduct less than "gross negligence that is the proximate cause

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[145] Bruce v. Hasbrouk, 620 N.Y.S.2d 562 (App. Div. 1994).
[146] *Id.* at 564.
[147] 527 N.Y.S.2d 61 (App. Div. 1988).
[148] *Id.* at 62.
[149] 589 So. 2d 323 (Fla. Dist. Ct. App. 1991).
[150] 521 N.W.2d 488 (Mich. 1994).

of the injury or damage"[151] did not preclude consideration of liability where more than one Defendant may have been proximate causes. To apply government immunity whenever a school district was not *the only* proximate cause would have overturned the doctrine of comparative negligence and reinstated contributory negligence.

Some of the impetus for selecting safe bus stops has been aided by state legislatures. For example, New Hampshire amended its school transportation statute in 1992 to provide that "[s]chool districts shall assure that pupils shall not be subject to unsafe conditions while walking the required distance to school bus stop and that the school bus stop is established in a safe location."[152]

2. Responsibility While En route to and from School

Assuming that a school district is not liable for student injury related to bus stop selection, a critical transitional question is at what point in time a district assumes responsibility for the safety of a student prior to the student's actual entrance onto the bus. In *Norton v. Canandaigua City School District*,[153] a New York Appeals Court refused to find liable a school district, a bus contractor or bus driver for injuries suffered by a ten-year-old student while crossing a street to get to a bus stop ten minutes before the bus arrived. The court found no special relationship between the student and the Defendants because nothing in New York statutes imposed a duty upon a bus driver to instruct a student to wait on the opposite side of the street until the bus had stopped. The court reasoned that:

> the School District and/or bus company and bus operator had not assumed control over plaintiff's daughter at the time of the accident. Whether a student should cross the street to wait for the school bus to arrive at the bus stop or wait to cross the street until the school bus arrives is a decision for a student or parent to make, not a school district.[154]

Similarly, statutes requiring school buses to keep a bus stopped with red signal lights flashing when receiving or discharging passengers does not apply to students walking along a road to catch a bus at another bus stop.[155]

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[151] MICH. COMP. LAWS § 691.1407(2)(c) (Supp. 1995).
[152] N.H. REV. STAT. ANN. § 189:8 (Supp. 1994).
[153] 624 N.Y.S.2d 695 (App. Div. 1995).
[154] *Id.* at 699.
[155] Karchere v. Pioneer Transp. Corp., 625 N.Y.S.2d 52 (App. Div. 1995).

However, once school children are on a school bus, the school has a duty to exercise ordinary, reasonable care to deliver them to their destination. Where children are involved, "the duty to exercise due care should be proportioned to the child's incapacity to adequately protect himself."[156] The duty can also vary depending on whether the school district owns and operates its own buses or rents the buses from a private contractor. In *Gallant v. Gorton*,[157] a private bus company was held to the same high duty of care as a common carrier (such as a railroad), rather than the lower ordinary duty of care owed by a public school district, and thus the company could be liable for an intentional act (rape) committed by the bus driver toward a student.

One of the most recent areas of litigation concerns safety features on buses, such as passenger seat belts. While most states seem to require seat belts for school bus drivers,[158] none to date seem to require passenger seat belts.[159] In *Dentson v. Eddins & Lee Bus Sales, Inc.*,[160] Plaintiffs, representing children injured in a school bus collision with an automobile, sought to extend the Alabama Extended Manufacturer's Liability Doctrine (AEMLD) to cover the manufacture and sale of school buses without seat belts. In ruling against the Plaintiffs, the Alabama Supreme Court held:

> We, therefore, find that by expressly mentioning driver's seat belts in the school transportation safety chapter of our Code, the legislature impliedly excluded the passenger seat belt as a necessary item on Alabama school buses....[T]he legislature's pronouncement is conclusive: a school bus in Alabama may not be found defective for purposes of the AEMLD merely because it is not equipped with passenger seat belts.[161]

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[156] Sharpe v. Quality Educ., Inc., 296 S.E.2d 661, 663 (N.C. Ct. App. 1982). *See also* Hawkins County v. Davis, 391 S.W.2d 658, 660 (Tenn. 1965) ("Reasonable and ordinary care under the circumstances, when one of the circumstances is that the care of a child of tender years is entrusted to the school bus driver, requires that the driver exercise special care proportionate to the age of the child and its ability, or lack of ability, to care for itself."). In addition, *see* Cartwright v. Graves, 184 S.W.2d 373, 377 (Tenn. 1944) (six-year-old "a wholly irresponsible age" and bus driver liable for failure to warn child of approaching truck as he alighted from bus).

[157] 581 F. Supp. 909 (D. Mass. 1984). *Cf.* Anderson v. Shaughnessy, 519 N.W.2d 229 (Minn. Ct. App. 1994) (common carrier standard of liability not appropriate where school bus operated by school district and student pays no fare).

[158] *E.g.*, ALA. CODE § 16-27-6 (1988).

[159] *E.g.*, IOWA CODE ANN. § 321.445 (2)(d) (1987) (excludes "passengers on a bus" from statute requiring use of seat belts/safety harnesses). *But see* ALASKA STAT. § 28.05.104(a)(2) (1994) (requirement of school belts left up to school district).

[160] 491 So. 2d 942 (Ala. 1986).

[161] *Id.* at 944. For Alabama statute citation *see supra* note 158.

In transporting school children, school districts can be expected to take whatever means are necessary to prevent reasonably foreseeable accidents. In *Arnold v. Hayslett*,[162] a school had assigned a teacher to serve as a monitor in assisting buses to pull safely out of the school parking area. The monitor's function was to give directions to the bus driver as he backed up the bus and to warn students to keep their heads and arms in the bus while it was in motion. After giving several warnings to a number of students to keep their heads and arms in the bus, the monitor signaled for the bus to back up; suddenly a twelve-year-old student stuck his head out of a window and was fatally injured when his head struck a guy wire in close proximity to the bus. In holding for the school district, the court observed that school buses are not common carriers and thus schools owe only "ordinary reasonable care under the circumstances."[163] In this set of facts, the deceased student's age plus repeated warnings by the monitor were enough to make the student's action proximate contributory negligence, thus precluding all recovery under Tennessee law.[164]

Control of students on buses has been the source of some litigation but certainly not to the extent that lawsuits occur alleging lack of supervision on school premises.[165] In *Blair v. Board of Education of Servurne-Earlville Central School*,[166] a student sustained permanent injury to his eye when struck by an object thrown by another student. In affirming the judgment in excess of $100,000 against Defendant school district the court noted that the driver had been advised at least fifteen minutes prior to the injury of disruptive behavior but had failed to take any action to stop it. Perhaps in response to unruly behavior on buses and anticipated liability for student injuries, some states have authorized the use of volunteers to ride buses and assist in maintaining order.[167]

However, some response by a bus driver may be adequate to remove liability. In a recent Minnesota Supreme Court decision that may have significant precedential value in other jurisdictions, the court in *Anderson v. Shaughnessy*,[168] where a student on the bus put away a paintball

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[162] 655 S.W.2d 941 (Tenn. 1983).

[163] *Id.* at 944.

[164] Tennessee is not a comparative negligence state but it does have a remote contributory concept which permits mitigated recovery of damages. In *Arnold* the trial judge had found the decedent guilty of remote contributory negligence and awarded $40,000 to his next of kin, but both the court of appeals and the supreme court found decedent's negligence to be proximate thus preventing all recovery.

[165] *See generally* Mawdsley, *supra* note 143 at 55-64. The relative infrequency of lawsuits regarding student conduct on buses probably reflects in large part the fairly short period of time students ride buses.

[166] 448 N.Y.S.2d 566 (App. Div. 1982).

[167] *E.g.*, OHIO REV. CODE § 3327.16 (Page 1994) (includes volunteer adults and responsible older students, but they are expressly not employees and are not compensated).

[168] 526 N.W.2d 625 (Minn. 1995).

pistol when told to do so by the driver, but then shot another bus passenger in the eye with the pistol immediately after exiting the bus, refused to extend the school district's responsibility in this situation beyond the safe disembarkation of students. "The duty with respect to transporting children has yet to be expanded beyond the safe deposit of the children at their scheduled destinations in a manner designed to allow their safe crossing of streets after disembarkation and we decline to do so here."[169]

While unforeseen occurrences can arise, bus drivers are agents of the school[170] and their actions or nonactions can generate liability for the school. In *Scott v. Thompson*,[171] a school district was liable for a $65,000 damage award where a student left the bus and was hit by a car after the bus driver left the bus with students on it and went into a garage for a cup of coffee. However, a school district, in *Johnson v. Carthell*,[172] was exempt from liability under governmental immunity when a bus driver held one of the students (who apparently was the nonaggressor) in an altercation so that the other student took advantage of the situation and struck the student being held in the eye. Missouri statutes created an exception to governmental immunity for "Injuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles within the course of their employment."[173]

In *Johnson*, the court interpreted its statute not to waive immunity for the school district because the driver's acts concerned actions in the bus, not operation of the bus.[174] However, even though the school district was immune from liability, the driver was still liable because he had failed to follow the prescribed written school district guidelines.[175] It is worth noting that the reason the bus driver in *Johnson* was not also in-

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[169] *Id.* at 626.

[170] Schools cannot insulate themselves from liability by using private transporters. *See* Whittington v. Sowela Technical Inst., 438 So. 2d 236 (La. Ct. App. 1983) and Caston v. Buckeye Union Ins. Co., 456 N.E.2d 1270 (Ohio Ct. App. 1982). The relationship between school-owned bus service and private bus service is not close enough to prevent eligibility of a driver for unemployment benefits when discontinued by school district and hired by private bus service. *See* Town of Milton v. Director of the Div. of Employment Sec., 438 N.E.2d 71 (Mass. 1982).

[171] 363 N.E.2d 295 (Mass. Ct. App. 1977).

[172] 631 S.W.2d 923 (Mo. Ct. App. 1982).

[173] MO. REV. STAT. § 537.600(1) (1988).

[174] Determination of what constitutes operation of a bus is frequently litigated, especially relating to the issue of government immunity. *See* Dinh v. Forest Hills Pub. Sch., 341 N.W.2d 510, 513 (Mich. Ct. App. 1983) (failure to instruct adequately a boy who spoke little English on how to cross a busy street was not "negligent operation of a motor vehicle"). For further discussion, *see infra* notes 237-71 and accompanying text.

[175] *Johnson*, 631 S.W.2d at 927 (school district handbook provided that, "The driver shall report disorderly conduct to the proper authority.").

cluded within the governmental immunity was because he was "required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed."[176] A somewhat similar result was reached in *Toeller v. Mutual Service Casualty Insurance Co.*,[177] where a bus driver and his independent bus contractor employer were ninety-three percent negligent for the injury which occurred to a boy during the time he was under suspension from the bus by the driver.[178]

Liability for the bus driver and/or the school district can also implicate civil rights under section 1983. In *Lopez v. Houston Independent School District*,[179] a parent whose son had been beaten unconscious on a school bus sought section 1983 damages based on the school district's alleged deliberate indifference to the rights of students by not adequately training drivers. Although summary judgment was affirmed as to the school district, Plaintiff was permitted to go to trial on both section 1983 and state tort claims against the bus driver. Disputed facts suggested that the driver had continued to drive the bus twenty-five to thirty minutes after being advised of the fight and drove to a convenience store to call his supervisor rather than take the bus directly to a hospital across the street. However, the court suggested that a section 1983 claim might lie against a school district and bus supervisors if fights on buses were other than episodic and the district had no adequate training program to deal with frequent fights.

Handling unruly students on a bus has always been a problem. One of the new strategies to deal with disruptive students is the use of in-bus videotaping. The State of Delaware has become the first "to outfit a portion of its bus fleet statewide with hidden video cameras to monitor student behavior and provide evidence to parents who question disciplinary actions."[180] The budgeted cost to outfit eighty of the state's 1250 buses with cameras, equipment and film was $185,000. In fact, the concern for school districts who want to use videotaping may be more financial than legal. Without an expectation of privacy, students would seem to have no legal ground for complaint. In the context of Fourth Amendment search and seizure analysis, the Supreme Court has imposed a requirement of "sub-

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[176] *Id.* at 927.
[177] 340 N.W.2d 923 (Wis. Ct. App. 1983).
[178] There is no indication that the school district had ever been a party to this lawsuit.
[179] 817 F.2d 351 (5th Cir. 1987).
[180] *Say Cheese!*, EDUC. WK., Sept. 21, 1994, at 4.

jective expectations of privacy"[181] as applied to searches of students, and generally state and federal courts have given great latitude to school districts in searching areas where students might allege to have an expectation of privacy, such as school lockers.[182] A New Jersey court has upheld, in *Desilets v. Clearview Board of Education*,[183] a general search of student hand luggage prior to a field trip. In *Desilets*, the search was pursuant to a provision in the signed parental permission slip permitting such searches and all hand luggage of every student was searched prior to the field trip.[184] In upholding the blanket search policy against federal and state search and seizure challenges, the court observed that:

> The deterrent effect of the board's search policy advances the legitimate interest of the school administrators in preventing student from taking contraband, in the broadest sense of the word, on field trips. The fact that this deterrence is not perfect, because students can hide some contraband, e.g., small quantities of drugs, on their persons, does not render the search unconstitutional.[185]

Even in states that recognize the tort of invasion of privacy, nothing in the use of in-bus videotaping should rise to the level of an actionable claim in terms of intruding into a student's seclusion or private life, as long as the school district has announced that videotaping is being used

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[181] New Jersey v. T.L.O., 105 S. Ct. 733, 742 (1985) (search of student's person subject to reasonable suspicion under Fourth Amendment and search of student revealing evidence of drug trafficking upheld in this case). More recently, the Court in Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995) upheld mandatory, random urinalysis drug testing for public school student athletes against a Fourth Amendment challenge. Although the Court refused to find that a "special relationship" existed between students and school authorities justifying the drug testing, the Court did conclude that "when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake." *Id.* at 2397.

[182] *See In re* Isaiah B., 500 N.W.2d 637, 641 (Wis. 1993) ("We agree with the state and hold that when the Milwaukee Public School System . . . , as here, has a written policy retaining ownership and possessory control of school lockers . . . , and notice of the locker policy is given to students, then students have no reasonable expectation of privacy in those lockers"); Zamora v. Pomeroy, 639 F.2d 662, 670 (10th Cir. 1981) ("Inasmuch as the school had assumed joint control of the locker it cannot be successfully maintained that the school did not have a right to inspect it."); People v. Overton, 301 N.Y.S.2d 479 (1969) (school administrators have power to consent to search of student's locker). *But see* State v. Engerud, 463 A.2d 934, 943 (N.J. 1983) ("We are satisfied that in the context of this case the student had an expectation of privacy in the contents of his locker. . . . For the four years of high school, the school locker is a home away from home. In it the student stores the kind of personal 'effects' protected by the Fourth Amendment.").

[183] 627 A.2d 667 (N.J. Super. Ct. App. Div. 1993).

[184] The search in *Desilets* did not turn up any contraband.

[185] *Desilets*, 627 A.2d at 673.

on the bus.[186] A pointed and poignant comment by the *Desilets* court in the context of field trips seems particularly applicable to any school bus setting: "Our memories are not so short that we cannot recall the rich opportunity for mischief which the field trip provides to some students. The need for closer supervision in the schoolhouse is intensified on field trips where opportunities abound to elude the watchful eyes of chaperons."[187]

Given the apparent lack of legal prohibition to using in-bus videotapes, an observation in Delaware that "[o]ne school bus that had numerous discipline problems was 'transformed' after the cameras were installed"[188] may be sufficient rationale to justify the financial cost of videotaping.

Dealing with disruptive students raises a question about suspending a student from a bus. However, a unilateral decision by a bus driver to suspend a student from a bus would be extraordinary in any context, especially if the driver failed to notify the school district of his decision and the school district had established guidelines regarding the responsibility to transport children. School bus drivers, whether employed by the school district or a private contractor, are required to follow district rules concerning the handling of unruly students on buses. Under one state's statute, the right of school authorities to suspend unruly students from a school bus has been upheld, even though the suspension was for five days and applied to all students on a bus route.[189] Any suspension from a bus needs to be preceded by notice to a parent and delivered to the parent

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[186] *See* Jarrett v. Butts, 379 S.E.2d 583, 585 (Ga. Ct. App. 1989) (faculty member who took pictures of student in classroom and in hallway of school building during regular school hours when other students present did not intrude upon the plaintiff-student's seclusion; the teacher had not revealed any aspect of the student "not readily visible to anyone who saw her during the day").

[187] *Desilets*, 627 A.2d at 672.

[188] *Say Cheese!*, EDUC. WK., Sept. 21, 1994, at 4. According to the Supreme Court in *Vernonia Sch. Dist.*, *supra* note 181, intrusion into student privacy can be based upon "the immediacy of the [School] District's concerns," which in that case was justified because "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. Disciplinary actions had reached 'epidemic proportions' ...." *Id.* at 2389.

[189] *See* Rose v. Nashua Bd. of Educ., 679 F.2d 279 (1st Cir. 1982) (New Hampshire has a statute permitting school superintendent "to suspend the right of pupils from riding in a school bus when said pupils fail to conform to the reasonable rules and regulations" of the board, but even without the statute the *Rose* suspension would probably have been upheld because the board had conducted hearings and considered alternatives before it reached its decision to suspend the students.). *See* N.H. REV. STAT. ANN. § 189:9-a (Supp. 1994).

in a manner reasonably calculated to reach the parent.[190]

Occasionally, a bus driver may encounter an emergency that requires immediate response. The bus driver's and school district's liability will then be determined by the reasonableness of the driver's response. In *Sparrow v. Forsyth County Board of Education*,[191] a student walking toward the front of a bus, while the bus was still moving, was injured when the driver suddenly applied the brakes after a snowball came through an open window and struck the driver on the side of the head. The driver jumped out of the bus, threw a snowball at the student who had hit him and upon re-entering the bus found the injured student. The court determined the driver's throwing of a snowball to be, in effect, irrelevant to the question of negligence and found that in stopping the bus the driver:

> acted as person of ordinary care and prudence would have acted under similar circumstances. The snowball being thrown into the bus in front of the driver brought about a sudden emergency which caused the driver to quickly stop the bus. There was, therefore, no negligence on the part of the driver in stopping the bus suddenly.[192]

In *Cogan v. KAL Leasing, Inc.*,[193] a bus driver did not have time to apply her brakes when a car turned sharply in front of her. Plaintiff-minor in the car, rendered quadriplegic as a result of the accident, alleged in her complaint that the bus driver would have had time to apply the brakes had she not had installed a block on the gas pedal to make driving more comfortable for her. In upholding a directed verdict for the school district the state appeals court found that the evidence clearly demonstrated that the sole proximate cause of the accident was the sharp turn in front of the bus, not the failure of the bus driver to apply the brakes. Similarly, in *Foster v. Craig Equipment Co.*,[194] neither the bus driver nor the school district were liable in a comparative negligence state in a products liability case involving a stuck accelerator. Considering the short span of time during the emergency (less than one minute), the bus driver's actions in

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[190] *See* Hollins v. Richland County Sch. Dist. One, 427 S.E.2d 654 (S.C. 1993) (whether note given to student advising of bus suspension but not delivered to mother constituted "slight care" so as to avoid gross negligence liability under state tort immunity statute a jury question). *See also* Toeller v. Mutual Serv. Casualty Ins. Co., 340 N.W.2d 923 (Wis. Ct. App. 1983) (school district liable after bus driver suspended boy from bus and boy was injured the following day when attempting to ride his brother's bike to school; the boy chose to ride the bike because he had not told his parents about the suspension and neither the bus driver nor the school had notified the parents).

[191] 198 S.E.2d 762 (N.C. 1973).

[192] *Id.*

[193] 546 N.E.2d 20 (Ill. App. Ct. 1989).

[194] 550 So. 2d 818 (La. Ct. App. 1989).

steering the bus, with the stuck accelerator and with screaming children, around cars until it struck a building was not negligent as a matter of law, even though she had failed to pull the emergency brake or hit the kill switch until a few seconds prior to impact.

But not every emergency is so sudden so as to exculpate a school district from liability. In *Minton v. Saint Bernard Parish Board*,[195] a child injured after running into the path of a school bus won a $200,000 judgment against the school board. In *Minton*, a school bus driver noticing a group of children ahead near the road slowed his bus to 40 to 45 mph. A child suddenly darted across the road followed by Plaintiff; the bus driver swerved his bus but Plaintiff panicked and ran into the path of the swerving bus. The driver and school board alleged a sudden emergency existed whereby the driver "had to make a choice between the safety of his passengers (by slamming on the brakes) and the safety of the pedestrians."[196] The court rejected this dichotomy as false because the bus driver's failure to apply the brakes and reduce speed more significantly when he first saw the children was the real act of negligence. By waiting unnecessarily to brake, the driver placed himself in the position of having to make a choice.

When events occur during a bus trip that could reasonably have been anticipated, courts are likely to find negligence. In *Sharpe v. Quality Education, Inc.*,[197] a school bus operated by Defendant's driver had a history of mechanical malfunctions, especially stalling. Rather than effect the necessary repairs, Defendant's solution was to furnish the bus with a set of jumper cables. On the date when Plaintiff was injured, Defendant's bus had stalled three times during the morning run. After the third time, the driver sent the oldest student across a divided four-lane highway to call the school. Plaintiff, a younger nine-year-old student, was told she could not cross the highway with the older student but then when she exited the bus the driver told the older student to hold her hand crossing the street. On the way back to the bus, Plaintiff was struck by a car when she stayed on the median after the older child had run across. In rejecting arguments that Plaintiff was contributorily negligent or that the driver of the car was the intervening cause, the court found that evidence existed that the driver and school could have reasonably foreseen the accident when they continued to operate a bus which repeatedly had problems and when they allowed the Plaintiff to cross the street after three warnings not to do so.[198]

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[195] 416 So. 2d 167 (La. Ct. App. 1982).

[196] *Id.* at 168.

[197] 296 S.E.2d 661 (N.C. Ct. App. 1982).

[198] This case reversed a summary judgment for the defendants so the court did not have to resolve the case on its merits.

As if bus drivers do not have enough responsibility for students, nonstudent pedestrians may also implicate drivers in legal obligations. In *Diaz v. Krob*,[199] a bus driver, stopped at a red light, waived a pedestrian to cross in front of the bus after the "Don't Walk" light had activated. The pedestrian was struck by an automobile that approached the crosswalk on the side of the bus not readily visible to the pedestrian. In dismissing the negligence complaint against the bus driver and the school district, the court held as a matter of law that the driver owed no duty to the pedestrian.

> An adult pedestrian with no obvious impairments should be held responsible for deciding whether gestures and directions given by a motorist can be safely followed. We simply do not believe that the instant bus driver's act of common courtesy should be transformed into a tort thereby giving the plaintiff license to proceed across an intersection against a warning light and without taking any precautions of her own.[200]

Clearly, the court's reasoning would not apply to disembarking students for whom the bus driver has a statutory duty to see they safely cross a street.[201] But the decision goes further and suggests that a duty may be created for nonstudents with impairments to whom a bus driver gratuitously gestures to cross a street.

3. Responsibility for Disembarking Students

The responsibility of school districts in establishing bus routes carries with it the duty to deliver students to their designated bus stops[202] and to monitor the safety of students at the bus stop. In *Roberts v. Saint*

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[199] 636 N.E.2d 1232 (Ill. App. Ct. 1994).

[200] *Id.* at 802.

[201] *See* Chainani v. Board of Educ. of N.Y., 608 N.Y.S.2d 283 (App. Div. 1993) (strict liability imposed for students crossing a street, whether or not bus drivers knew students normally crossed the street); Yeager v. Morgan, 429 S.E.2d 61 (W. Va. 1993) (state statute provided that "the driver in charge of the school bus ... shall exercise such authority and control [in the place of the parent or guardian] over the children" [W. VA. CODE § 18-5-1 (Supp. 1994)] and jury question presented as to whether driver should have kept flashers on longer for a child who had been discharged on the side of the street she lived but had crossed the street behind the bus to the mailbox).

[202] Guidelines for determining bus routes may be established by statute for state departments of education, *e.g.*, IOWA CODE ANN. § 285.8 (West 1988); MINN. STAT. ANN. § 123.39(1)(2) (West 1993), as well as local boards of education, *e.g.*, IOWA CODE ANN. § 285.11 (West 1988); FLA. STAT. ANN. § 234.02 (West Supp. 1994). Whether guidelines are established by statutes or regulations the standard is clearly to locate and operate routes "for the protection of the health and safety of pupils transported." IOWA CODE ANN. § 285.8(3) (West 1988).

Bernard Parish School Board,[203] an appeals court reversed summary judgment for Defendant school board where a student had been permitted by the bus driver to leave the school bus at a bus stop other than his regular stop. The student had been injured while attempting to cross the street after the bus had left. What made the facts particularly damaging for Defendant was that Plaintiff's parents had repeatedly told the bus driver and the superintendent not to drop the student at any other than his assigned bus stop. *Roberts* indicates that dropping a student at a site other than his regular bus stop not only defeats the purpose of establishing bus routes, but also frustrates parents who entrust their child to the school "not only during school hours, but also while he [is] riding to and from school in a School Board bus."[204]

Of course, parents might be able to authorize that their child be left at a different school bus stop but a school district would be advised not to do so unless the bus driver is presented a note signed by the parent and an appropriate school official. Such change should apply *only* to established bus stops, never to locations not designated as bus stops.[205] Since the selection of bus stops involves consideration of student safety as well as effect on traffic patterns, leaving a student at an unauthorized bus stop subverts the policies underlying the selection.

The responsibility of a school district at the point of disembarkation at a bus stop generally includes the safety of the child if he/she must cross the road.[206] Bus drivers and school districts will invariably be liable if the driver fails to use the flashing signal lights as required by

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[203] 427 So. 2d 676 (La. Ct. App. 1983).

[204] *Id.* at 678. *See also* Thompson v. Anderman, 285 P.2d 507 (N.M. 1955) (bus driver liable as matter of law for allowing child of 13 with mental age of 10 to alight from bus at other than regular bus stop). Although not directly addressed in *Roberts* there is probably a difference in the degree of care owed to students in school as opposed to those transported home on a bus. Generally, a school is not liable if a student entrusted to the care of a school leaves the school without authorization and is subsequently injured. *See* Levandoski v. Jackson City Sch. Dist., 328 So. 2d 339 (Miss. 1979) (school not liable for student killed after skipping out of classes); Oglesby v. Seminole City Bd. of Instruction, 328 So. 2d 515 (Fla. Dist. Ct. App. 1976) (no school liability for student killed on way home from school). *Contra* Hoyem v. Manhattan Beach City Sch. Dist., 585 P.2d 851 (Cal. 1978) (school had duty to prevent students from skipping out of school before the end of the school day). Because school buses represent a smaller area to monitor, because students are on buses for a significantly shorter time than in school, and because egress is easier to monitor for buses, school districts should be more responsible for students who leave buses at unauthorized stops.

[205] *But see* Gaston v. Hutchinson, 853 S.W.2d 729 (Tex. Ct. App. 1993) (school district immune for death of student killed as passenger in car after he had been let out at his own request at a nondesignated bus stop; court reasoned that death of the student had resulted from the use of the automobile, not the use or operation of the bus).

[206] Nolan v. Bronson, 460 N.W.2d 284 (Mich. Ct. App. 1990); Johnson v. Scoboda, 260 N.W.2d 530 (Minn. 1977).

statute to protect students exiting the bus and crossing the street at the bus stop.[207] The duty of a bus driver at a bus stop may extend to continue activation of flashers until a child has crossed a street, even though the child actually lives on the same side of a street as the bus stop. In *Farley v. El Tejon Unified School District*,[208] knowledge by the bus driver that a child who lived on the same side of a busy street as the bus stop and frequently crossed the street to meet family members, was sufficient to create a duty for the driver to continue the flashers until the child had exited the bus and was completely across the street. The duty to continue activation of flashers, which bus drivers owe to children riding the bus, can also be extended to motorists. In *Clomon v. Monroe City School Board*,[209] a four-year-old child was struck by a motorist after the bus driver had deactivated the flashers but before the child had reached the side of the street opposite the bus. The Louisiana Supreme Court upheld not only a recovery against the school district on behalf of the injured child, but also an award for emotional and mental injuries against the district on behalf of the motorist whose car struck the child. Regarding the reliance that a motorist can place on the activation and deactivation of flashers, the court observed:

> [T]he motorist is required and entitled to rely for his safety, convenience and peace of mind upon the bus driver's performance of his duty to activate highly visible signals, await the child's safe passage and remain as stationary sentinel until the child's security is clearly

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[207] *See* Dunn v. Gentry, 653 So. 2d 783 (La. Ct. App. 1995) (bus carrier liable as a matter of law for failure to use semaphore and red lights at bus stop and summary judgment for carrier reversed in favor of $200,000 award to parents); Yurkovich v. Rose, 847 P.2d 925 (Wash. Ct. App. 1993) (school district and bus driver liable as matter of law when driver failed to use stop sign or flashing lights); Hitchcock v. Garvin, 738 S.W.2d 34 (Tex. Ct. App. 1987) (disputed evidence as to whether bus driver properly activated flashers on bus to indicate bus was slowing to stop and discharge children precluded summary judgment for the school district); Croghan v. County Bd. of Educ., 549 S.W.2d 306 (Ky. Ct. App. 1977) (bus driver negligent as matter of law for failure to activate flashers at bus stop). For an example of a statute, *see* IOWA CODE ANN. § 321.372(1) (West 1985) ("At the point of receiving or discharging pupils the driver of the bus shall bring the bus to a stop, turn off the amber flashing warning lamps, turn on the red flashing warning lamps, and extend the arm."). *See generally* Slade v. New Hanover County Bd. of Educ., 178 S.E.2d 316 (N.C. Ct. App. 1971); Taylor v. Patterson's Adm'r, 114 S.W.2d 488 (Ky. 1938); Iowa Op. Att'y Gen. (Dec. 5, 1980), (June 4, 1979), (Nov. 15, 1978).

[208] 274 Cal. Rptr. 780 (Ct. App. 1990). *See also* Yeager v. Morgan, 429 S.E.2d 61 (W. Va. 1993) (jury question presented as to whether bus driver turned off flashers too soon where disembarking 14-year-old crossed road behind bus to check mail and was struck by a car).

[209] 572 So. 2d 571 (La. 1990).

> assured.... [I]t is evident that the bus driver's duty is owed not only to the careful motorist but also to the inattentive driver who may have relied on the busman's signals or lack thereof.... [I]t would not be just to deny the motorist recovery for any damage attributable to the bus driver's negligence.[210]

New York has imposed a strict liability standard for the care of embarking and disembarking students. The state statute requiring bus drivers to instruct students to cross in front of the bus has been interpreted to mean that a driver and his/her employer are liable whether or not they were aware students had to cross the street.[211]

Responsibilities at the point of disembarkation may involve seeing that a student gets safely from the bus to the school building. In a troubling case, *Hernandez v. Rapid Bus Co.*,[212] a bus company faced potential liability for the rape of a special education student which occurred between disembarkation from the bus and entrance into the school building. The bus company had voluntarily provided an attendant to walk students from the bus to each building on the bus run, then the attendant would stay in the school building at the last stop until the end of the school day and ride the bus for the return run. However, after a bus schedule change, the sequence of the last two stops was reversed and the attendant left the bus prior to Plaintiff's school building stop. Although parties would normally not be liable for the criminal actions of others, liability for the bus company in this case was predicated on the following two factors: voluntarily assuming the duty to ensure that students made it safely from the bus to the school building; and notice that a passenger (who committed the rape) on the bus had violent and criminal propensities.

Following the line of cases discussed above, several general rules may help in reducing litigation. Schools need to use care to place bus stops wherever possible in places easily visible to approaching traffic and identify bus stop locations with appropriate signs. In addition to continuing use of the flashers until the child has reached the edge of whichever side of the road is his/her destination, the flashers should not be turned off until students entering the bus have taken a seat. When discipline problems arise, bus drivers must promptly inform the appropriate school officials; under no circumstances should bus drivers suspend or otherwise remove troublesome students

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[210] *Id.* at 578.

[211] Chainani v. Board of Educ. of N.Y., 608 N.Y.S.2d 283 (App. Div. 1993) (although driver and independent bus company co-liable for $3,000,000 judgment, school district escaped liability because it was not liable for negligent performance of independent contractors [N.Y. Veh. & Traf. Law § 1174(b) (McKinney Supp. 1994)]. *See also* Nichter v. Hartley, 596 N.Y.S.2d 865 (App. Div. 1993) (driver owed duty to warn disembarking student of rapidly approaching vehicle).

[212] 641 N.E.2d 886 (Ill. App. Ct. 1994).

from the bus unless authorized by transportation guidelines to do so.[213] Finally, when bus companies and/or school districts act in certain ways to protect student safety, such as providing bus attendants, reductions in the level of care offered need to be evaluated in terms of foreseeable risks at bus stops and the dangerous nature of students being transported.

D. School Defenses in Transportation Litigation

1. Satisfaction of Notice Requirements

Since bus drivers and school districts face considerable potential for liability regarding transportation decisions, they should be able to avail themselves of whatever defenses can normally be interposed in lawsuits involving public education. The most frequently interposed defenses involving claims against a public defendant concern satisfaction of appropriate notice requirements and governmental immunity.

The concept of notice refers to knowledge by the public entity that a party has been injured or otherwise damaged in some manner involving the property or agent of the public body and that the injury/damage was the fault of the school district and/or its employees. As will be evident in the following discussion, state statutes have prescribed a certain procedure to standardize and formalize the furnishing of a claim to a public entity that an injured party has a claim regarding certain injury or damage. However, knowledge of such a claim can be acquired by agents of a public entity whether or not the injured party has complied with the statute and thus courts have become enmeshed in evaluations of individual sets of facts as to whether there has been "substantial compliance," i.e., whether the injured party through his own efforts or the efforts of his agent has supplied sufficient information to make public officials aware that a tortious wrong is alleged to have been committed. Because the statutory window to furnish notice of a claim for injury or damage tends to be fairly short, and because the effect of failing to furnish notice is loss of any claim against the public entity, courts have frequently been somewhat solicitous toward injured claimants.[214]

At least three critical legal questions arise when the issue of timely

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[213] A bus driver removing a student from a bus at other than the student's normal bus stop may be in violation of state statute, as well as any district rules. *See, e.g.*, FLA. STAT. ANN. § 232.28(3) (West 1989) ("The bus driver shall ... not ... put any pupil off the bus at other than the regular stop for that pupil, except by the order of the parent or the principal in charge of the school the pupil attends.").

[214] The nature of the claim may influence judicial response to late claims. A notice requirement may be interpreted more narrowly where employee termination is the issue as opposed to where an injured student is involved. In McClellan v. Alexander Cent. Sch. Bd. of Educ., 607 N.Y.S.2d 812 (App. Div. 1994), a bus driver, terminated for falsifying his time card, was time-barred when he failed to file his claim with the school board within three months. A memorandum sent by the driver to the school board three days after the termination did not substitute for notice of claim because it failed to specify the nature of the claim, and the time when, the place where, and the manner in which the claim arose.

notice becomes important: whether the notice of claim was served within the requisite number of days;[215] whether the notice was served to the right person;[216] and whether failure to give notice within the required number of days or serve the right person is excusable under the circumstances through substantial compliance.[217] Virtually all states specify by statute the number of days a claimant has to file notice of a claim. The purposes for timely notice of claims have generally been held to be "to further legitimate state interests by fostering prompt investigation while the evidence is still fresh; the opportunity to repair any dangerous condition; quick and amicable settlement of meritorious claims; and preparation for fiscal planning to meet any possible liabilities."[218]

In *Graves v. Rose*,[219] a twenty-three month delay in the school district receiving actual notice of an injury and claim "prejudiced the School District's interest in prompt investigation while the evidence was fresh."[220] Similarly, a three-year delay in seeking to serve a late notice of claim on a school district as a result of sexual abuse of two eight- and nine-year-old students was not excused because "the [students'] infancy was clearly unrelated to the delay in making application ...[and] the delay substantially

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[215] *See, e.g.*, OKLA. STAT. ANN. tit. 51, § 156B (West 1988) (filed within 90 days after the loss occurs); CAL. GOV'T CODE § 911.2 (West 1980) (filed not later than the 100th day after the accrual of the cause of action).

[216] OKLA. STAT. ANN. tit. 51, § 156(D) (West 1988) (filed with the clerk of the governing body of the political subdivision); CAL. GOV'T CODE § 945.4 (West 1980) ("[N]o suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented ... until a written claim therefore has been presented to the public entity ... ").

[217] As is indicated in the discussion, at *supra* note 214 and accompanying text, courts are willing to apply a "substantial compliance" standard in determining whether the defendant public entity had actual knowledge of the claim, even if the claim was not provided in the form required by statute. For example, language in OKLA. STAT. ANN. tit. 51, § 156B (West 1988) that a claim not made within 90 days is "forever barred" has a finality that the courts have tended to honor as much by the exception as by the rule. *See* cases at *infra* notes 218, 222, 226.

[218] Reirdon v. Wilburton Bd. of Educ., 611 P.2d 239, 241 (Okla. 1980) (no prejudice to defendant where letter concerning claim sent approximately within statutory period and pending litigation had been discussed in board meeting); Duesterhaus v. City of Edmond, 634 P.2d 720 (Okla. 1981) (actual notice within statutory period to representative of municipality adequate); Johns v. Wynnewood Sch. Bd. of Educ., 656 P.2d 248 (Okla. 1982) (filing requirement in state tort claims act takes precedence over statute tolling tort claims for minors until one year after 18th birthday); Ross v. City of Shawnee, 683 P.2d 535 (Okla. 1984) (notice of accident not substitute for notice of tort claim); Sysco Intermediate Food Serv. v. City of Twin Falls, 705 P.2d 548 (Idaho Ct. App. 1985) (inadvertent filing of claim by inexperienced clerk rather than sending to insurer not prejudicial since insurer already had actual notice).

[219] 663 P.2d 733 (Okla. 1983).

[220] *Id.* at 735.

prejudice[d] the [district's] ability to defend the claim on its merits."[221] However, it is difficult to discern what constitutes prejudice to a school district; presumably any late claim would affect the purposes for timely notice of claims. Where the statutory filing time frame has been exceeded, courts become immersed in weighing the plaintiff's reasons for nontimely filing against the school district's allegations of prejudice. In *Duesterhaus v. City of Edmond*,[222] even though written notice of a claim was required by the statute, verbal notice to the political subdivision's attorney was considered to be substantial compliance when the city could show no prejudice. Likewise, in *Ireland v. Hinkle*,[223] a claim filed two days beyond the statutory limit was permitted where "the school district and its insurer had prompt notice of the accident and an opportunity to investigate" and the school district could prove no prejudice.[224]

On the other hand, an accident report sent to the appropriate state agency was held not to establish actual notice to a local school district or its driver and a subsequent lawsuit against the school district and its driver was dismissed.[225] But a written notice of claim sent to the clerk of the wrong political subdivision (city rather than school district) was held not to be prejudicial where attorney for claimant had also previously notified in writing the school district's insurer.[226]

As just suggested, where timely notice has not been served on any party who could act in a reasonable manner to protect its valid interests, then courts tend to look at plaintiff's excuses for nonfiling. *Ebersol v. Cowan*[227] presents an interesting set of facts pertaining to just such a problem. In *Ebersol*, a bus driver who had been bitten on her hand by one of her mentally retarded teen-age passengers failed to file a claim within the statutory 100-day limit. Her injury resulted in at least five visits to a hospital over a three-month period of time culminating in surgery and ongoing medical treatment for tissue degeneration. During the four months following the injury the bus driver contacted nine different attorneys who either informed her she had no cause of action or expressed no interest in her claim. On advice of a tenth attorney she finally presented her claim 127 days after the accrual of her cause of action. Her claim was summarily denied by the school district and the denial was affirmed by the trial court.

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[221] Zee v. Hicksville Union Free Sch. Dist., 633 N.Y.S.2d 279 (App. Div. 1994) (However, timely service had been made on the bus driver who had allegedly abused the children, the religious school to which the children were being transported, and the bus company).

[222] 634 P.2d 720 (Okla. 1981).

[223] 577 N.Y.S.2d 541 (App. Div. 1991).

[224] *Id.* at 542.

[225] *Graves*, *supra* note 219.

[226] Conway v. Ohio Casualty Ins. Co., 669 P.2d 766 (Okla. 1983).

[227] 673 P.2d 271 (Cal. 1983).

In reversing the trial court, the California Supreme Court distinguished between this case where Plaintiff "acted diligently to retain legal counsel within the 100-day limitation period"[228] and other "cases where the conduct of plaintiff's retained counsel was clearly unreasonable or inexcusably dilatory."[229] In addition the court noted that Plaintiff "sought to retain legal counsel to pursue her claim rather than undertake an independent investigation of the facts and the law of her own case."[230] In other words, unless a school district can prove prejudice for a nontimely filing, courts may be willing to permit a claim to ripen into a possible legal course of action where a plaintiff, who sought to work through the adversarial system, would be denied any relief at all if the late claim were not permitted.[231] However, as suggested in *Ebersol*, a potential claimant whose delay in filing a claim is due to her own attempts at investigation may find the late claim denied altogether.

The reason for making a claim to a public entity before any lawsuit can be commenced is to provide an opportunity for settlement without unduly depleting public resources. If a claimant's entire claim is paid by the public entity or if the claimant accepts less than the claim as full settlement he/she is generally precluded from filing a lawsuit.[232]

But even if timely notice has been furnished to a public entity (such as a school district), and no satisfactory settlement has been made with the claimant, many states require by statute that a lawsuit be filed within a specified period of time after denial of the claim by the public entity against which the claimant has the claim, or the claim is barred.[233] In other words, an injured party who claims that his/her injury resulted from the conduct of a public entity has two opportunities for losing, once at the notice-of-claim stage and then at the filing-of-lawsuit stage. In *Lucas v. Independent School District No. 35*,[234] a claimant injured in a collision with a school bus had six months after the school district was deemed by statute to have

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[228] *Id.* at 277.

[229] *Id. See also* 276-77, nn. 9-11.

[230] *Id.* at 279.

[231] Liability of the school district in *Ebersol* for the act of a student on the bus is somewhat speculative, which probably accounts for the number of attorneys who indicated no interest in the case. Regarding the liability of a person in a supervisory position for the acts of one being supervised, California law is controlled by Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976) which restricts liability to certain professions.

[232] *See, e.g.*, CAL. GOV'T CODE § 946 (West 1980).

[233] *See, e.g.*, OKLA. STAT. ANN. tit. 51, § 157 (West 1988) (claimant must file complaint in lawsuit within six months after claim has been denied, or deemed to have been denied, by the political subdivision against which the claim has been made).

[234] 674 P.2d 1131 (Okla. 1983).

denied her claim to file her lawsuit.[235] Despite claimant's allegations that she was incapacitated for medical reasons for part of the six-month statute of limitations, the *Lucas* court refused to toll the statute of limitations for the period of the alleged incapacitation. *Lucas* seems to suggest that courts may be more inflexible regarding late filings of lawsuits than for late notice of claims. In *Racich v. Anderson*,[236] a person injured in an automobile collision with a school bus argued unsuccessfully that Illinois' two-year statute of limitations should apply to a lawsuit against a bus driver in her individual capacity rather as an employee of the school district. The Illinois Appeals Court ruled that the state Local Governmental and Governmental Tort Immunity Act one-year statute of limitations for claims "against a local entity or any of its employees" applied, and thus the lawsuit filed eighteen months after the accident was time-barred.

2. Sovereign or Governmental Immunity

When public entities are Defendants, the most frequently interposed defense is sovereign or governmental immunity. Governmental immunity prohibits tort actions against government agencies, but the modern trend in the United States is for states to either abrogate governmental immunity altogether or to design statutory exceptions (or waivers) to tort immunity.[237] Generally, the immunity exception applies only to the extent that the school district is indemnified by the insurer for the negligence or tort.[238] However, a plaintiff must make a specific claim under one or more of the statutory exceptions and failure to do so will result in the presumption that governmental immunity applies.[239]

A common exception to governmental immunity concerns the waiver of immunity to the extent of the dollar value of liability insurance purchased.[240] The insurance waiver may include both no-fault and damages

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[235] Under OKLA. STAT. ANN. tit. 51, § 157 (West 1988), a claim is considered to have been denied by a political subdivision (school district) if not approved by the subdivision within 90 days.

[236] 608 N.E.2d 972 (Ill. App. Act. 1993).

[237] See discussion in K. ALEXANDER & M. DAVID ALEXANDER, AMERICAN SCHOOL LAW 484-86 (1985).

[238] *E.g.*, N.C. GEN. STAT. § 115C-42 (1994); OKLA. STAT. ANN. tit. 70, § 9-106 (West 1989).

[239] Mt. Pleasant Indep. Sch. Dist. v. Estate of Lindberg, 766 S.W.2d 208 (Tex. 1989).

[240] *See, e.g.*, S.C. CODE § 59-67-710 (Law. Co-op. 1990) ($50,000); OKLA. STAT. ANN. tit. 51, § 153 (West 1988) ($100,000). *See also* Singletary v. South Carolina Dep't of Educ., 447 S.E.2d 231 (S.C. Ct. App. 1994) ($1,5000,000 judgment to motorist injured after running into stalled school bus reduced to statutory insurance cap of $250,000); Richardson v. Rankin County Sch. Dist., 540 So. 2d 5 (Miss. 1989) (despite judgment against school district of $550,000 plaintiff could only recover $10,000, the maximum of liability coverage under the immunity statute); Brown v. Egan Consol. Sch. Dist., 449 S.W.2d 259 (S.D. 1989) (summary judgment for school district on basis of governmental immunity not appropriate where immunity had been waived to extent of insurance coverage).

provisions, although a plaintiff may not be able to recover under both.[241] The mere existence of insurance coverage does not affect governmental immunity unless plaintiffs can "plead either that the defendant's activity comes within one of the statutory exceptions to immunity or that the activity did not constitute the exercise or discharge of a governmental function."[242]

Frequently, the insurance exception can be combined with waiver claims under other exceptions. In *Smith v. McDowell County Board of Education*,[243] an accident involving the school district's driver education car subjected the school board to tort liability to the extent of the district's insurance coverage because the car was not a "school transportation vehicle"[244] within one of the immunity statute's provisions. However, in *King v. Little Rock School District*,[245] a school district was immune from tort liability where it had leased two buses for a one-day field trip because under state statute the district was required to carry liability insurance only on its own motor vehicles.[246]

Another exception to governmental immunity involves the operation of vehicles owned by a governmental entity. Generally, school districts are liable for injuries resulting from operation or use of their own motor vehicles.[247] Despite creative efforts by plaintiffs in arguing that certain kinds of conduct amount to vehicle operation, the courts have found that these actual situations do not come within statutory exceptions to

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[241] *See* Toney v. South Carolina Dep't of Educ., 327 S.E.2d 322 (S.C. 1985) (recovery under no-fault portion of Wrongful Death Act for death of child precluded recovery under damages portion because, had the child survived, he would not have been able to recover under both).

[242] Dinh v. Forest Hills Pub. Sch., 34 N.W.2d 510, 513 (Mich. Ct. App. 1983). *See also* Bartley v. Special Sch. Dist. of St. Louis County, 649 S.W.2d 864 (Mo. 1983) (purchase of liability insurance did not automatically waive governmental immunity; claim had first to come within an immunity exception); Gunter v. Anders, 444 S.E.2d 685 (N.C. Ct. App. 1994) (without allegation that school board had waived immunity by purchase of insurance, complaint failed to state claim).

[243] 316 S.E.2d 108 (N.C. Ct. App. 1984).

[244] N.C. GEN. STAT. § 143-291 *et seq.* (1994) provides for an industrial commission to hear tort claims involving "school transportation vehicles" rather than using the judicial system.

[245] 782 S.W.2d 574 (Ark. 1990).

[246] *See* ARK. CODE ANN. § 21-9-303 (Michie Supp. 1993) (political subdivisions have option of carrying liability insurance or becoming self-insured).

[247] *See* Roe v. Lawn, 634 N.E.2d 117, 119 (Mass. 1994) (sexual assault by bus driver arose out of use of school bus for purpose of business motor vehicle policy coverage; school bus use "carried an implied promise of safe passage"); State Farm Mut. Auto. Ins. Co. v. Kentucky Sch. Bd. Ins. Trust, 851 F. Supp. 835, 839 (E.D.Ky. 1994) (child struck by car while crossing road when flashers were activated related to use of bus because "purpose of the school bus's flashing lights and the law requiring oncoming vehicles to stop while the bus is unloading is to allow students to safely cross the street"). *See* KY. REV. STAT. ANN. §§ 189.920, 189.950 (Baldwin 1993).

governmental immunity pertaining to vehicle operation: permitting students to enter or exit a parked bus through the rear emergency door;[248] a bus stopped to pick up a child hit while crossing the street;[249] design of bus stops;[250] failure to advise a student how to walk safely along a highway;[251] failure to place bus warning signs;[252] the act of a bus driver in holding a student while another student struck him;[253] and the sexual assault of a student by a taxi-driver employee of a company contracted to transport students with disabilities.[254]

Another exception to governmental immunity can involve the responsibility for certain public entities to maintain appropriate traffic controls. In *Aberant v. Wilkes-Barre Area School District*,[255] parents, suing on behalf of their child killed after disembarking from a school bus, unsuccessfully sought to argue that the flashing lights on a school bus were "traffic controls ... under the care, custody or control of the local agency,"[256] an exception to governmental immunity in Pennsylvania. In rejecting the parents' claims, the court observed that "[a] school bus is a motor vehicle to which the lights are affixed. The lights are a part of the vehicle and not a traffic control light."[257] In *Smith v. City of Chester*,[258] a federal district court interpreting the same statute refused to find that school traffic guards were "traffic controls." Parents of children killed while crossing a street where a crossing guard had failed to show up were precluded from suing the school district. However, in a South Carolina case, statutory immunity for "signs, signals, warning devices ... normally connected with the use of public ways"[259] did not apply to the flashing lights on a bus which were not operating when a motorist ran into the bus stalled on a highway.[260]

Where state statutes create liability for nondiscretionary or ministerial governmental functions, the question for courts is whether the decision involves planning (usually protected by governmental immunity) or

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[248] LeLeaux v. Hamshire-Fannett Indep. Sch. Dist., 835 S.W.2d 49 (Tex. 1992).

[249] Newgent v. Buncombe County Bd. of Educ., 442 S.E.2d 158 (N.C. Ct. App. 1994); *see also* Gaston v. Hutchison, 853 S.W.2d 729 (Tex. Ct. App. 1993) (student killed as passenger in car after being let off at undesignated bus stop).

[250] Smith v. Weber County Sch. Dist., 677 P.2d 1276 (Utah Ct. App. 1994).

[251] *Dinh*, *supra* note 242.

[252] Harrison v. Escambia County Sch. Bd., 419 So. 2d 640 (Fla. Dist. Ct. App. 1982); *contra* Brooks v. Woods, 640 P.2d 1000 (Okla. 1982).

[253] Johnson v. Carthell, 631 S.W.2d 923 (Mo. Ct. App. 1982).

[254] S.H. v. State, 865 P.2d 1363 (Utah 1993) (immunity from negligence applies to "injury [that] arises out of ... [an] assault [or] battery"). UTAH CODE ANN. § 63-30-10(2) (1993).

[255] 492 A.2d 1186 (Pa. Commw. Ct. 1985).

[256] PA. STAT. ANN. tit. 42, § 8541 (1982).

[257] *Aberant*, 492 A.2d at 1188.

[258] 851 F. Supp. 658 (E.D.Pa. 1994).

[259] S.C. CODE ANN. § 15-78-69 (Supp. 1993).

[260] Singletary v. South Carolina Dep't of Educ., 447 S.E.2d 231 (S.C. Ct. App. 1994).

operations (not protected). Unfortunately, the distinction between the two functions frequently becomes little more than labeling.[261] For example, school district planning of bus stops might be considered to be a planning function, and therefore be immune from liability, but the improper stopping of a bus along a highway could be an operational function, and immunity would be waived.[262] Similarly, a state's placement of a sign designating an area as a school zone may be discretionary, but failure to lower the posted 45 mph limit might be sufficient to waive governmental immunity.[263] In *Webb v. Reisel*,[264] the duty of a school district's director of pupil transportation in selecting a safe debussing site was discretionary and therefore he was immune from tort liability because his selection had been based on his extensive experience with traffic and reliance on specialists and staff investigations of debussing sites. Judicial distinctions appear to reflect fine gradations among various kinds of government acts and a consistent policy concerning operational or planning functions is difficult to discern. The result has been decisions that appear to conflict within the same jurisdiction,[265] as well as from one jurisdiction to another.[266] The lesson for plaintiff and school district alike is that interpretation of governmental immunity may involve a very fluid approach.

In states which predicate tort liability on a standard of gross negligence, a school district may escape liability if it demonstrates at least slight care.[267]

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[261] *See The Discretionary Exception and Municipal Tort Liability: A Reappraisal*, 52 MINN. L. REV. 1047 (1968).

[262] *See* Houle v. Galloway School Lines, Inc., 643 A.2d 822 (R.I. 1994) (design of bus routes a discretionary function but school district can be liable if it had notice of dangers with the design); Chee Owens v. Leavitts Freight Serv., 745 P.2d 1105 (N.M. Ct. App. 1987). Similarly, failure of a bus driver to properly activate flashers to indicate a bus is stopping to discharge children can be an "act or omission arising from the operation or use of a motor vehicle" and therefore constitute a waiver of governmental immunity. Hitchcock v. Garvin, 738 S.W.2d 34 (Tex. Ct. App. 1987).

[263] *See* Garza v. State, 878 S.W.2d 671 (Tex. Ct. App. 1994).

[264] 858 S.W.2d 767 (Mo. Ct. App. 1993).

[265] *See* cases *cited in Harrison, supra* note 252 at 650.

[266] Some jurisdictions recognize that the government's planning function does not protect faults in designs that are so obvious as to be inherently dangerous. *See* Dodds v. West Liberty, 281 N.W. 476 (Iowa 1938); Gould v. Topeka, 4 P. 822 (Kan. 1884); Donnely v. Ives, 268 A.2d 406 (Conn. 1970); Paul v. Farley, 37 N.W.2d 427 (Minn. 1949).

[267] Clyburn v. Sumter County Sch. Dist. 17, 429 S.E.2d 862 (S.C. Ct. App. 1993) (attempt by bus driver and school officials to resolve altercation, involving one student using a knife toward another, enough to avoid all liability even though police had never been called); Hollins v. Richland County Sch. Dist. One, 427 S.E.2d 654 (S.C. 1993) (whether giving note regarding bus suspension to student to deliver to mother met slight care standard a jury question).

Of course, the fact that a school district is immune from liability does not mean that the bus driver is also immune.[268] In *Plummer v. Dace*,[269] a cause of action against a school bus driver for allegedly permitting a six-year-old child to alight at an unsafe place where he was struck by a car was upheld, even though the cause of action against the school district was dismissed under governmental immunity. The *Plummer* court reasoned that the complaint against the school district alleging negligence in properly training its bus drivers did not come within the bus operation exception to governmental immunity. Similarly, payment by a school district of the maximum statutory coverage does not preclude recovery of damages in excess of that amount from the bus driver as an individual.[270] In *Lopez v. Houston Independent School District*,[271] the school district and its transportation were immune from section 1983 claims based on inadequacy of driver training where there was no evidence that fights on the bus were more than episodic. However, the bus driver could be sued individually under section 1983 to determine if his conduct demonstrated "callous disregard" for the injured student's rights.

3. Contributory Negligence

Even where plaintiffs have given appropriate notice and where their claim is not barred by governmental immunity, recovery on their claim may be barred in whole or in part by the plaintiffs' own contributory negligence (or the contributory negligence of the party on whose behalf the plaintiffs are suing). In comparative negligence states, appeals courts tend to carefully scrutinize trial court opinions to evaluate such matters as whether a high percentage of contributory negligence should have been assigned to a child,[272] whether a low percentage of fault assigned to vehicles other than the school bus was correct,[273] whether apportionment of damages among defendants was supportable by the evidence,[274] whether the correct legislative standard had been used in assessing liability,[275]

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[268] *See* Johnson v. Carthell, *supra* note 253.

[269] 818 S.W.2d 317 (Mo. Ct. App. 1991).

[270] Oakley v. Thomas, 434 S.E.2d 663 (N.C. Ct. App. 1993).

[271] 817 F.2d 351 (5th Cir. 1987).

[272] Branch v. Stehr, 461 N.Y.S.2d 346 (App. Div. 1983) (new trial awarded where jury apportioned 90% fault to six-year-old child); Chainani v. Board of Educ. of N.Y., 608 N.Y.S.2d 283 (App. Div. 1994) (25% negligence apportioned to 14-year-old upheld in $3,000,000 award).

[273] Toeller v. Mutual Serv. Casualty Ins. Co., 340 N.W.2d 923 (Wis. Ct. Ap. 1983) (jury determination upheld finding bus company to be 93% negligent while truck owner that struck child was only 1% at fault).

[274] Clomon v. Monroe City Sch. Bd., 572 So. 2d 571 (La. 1990) (school district 70% liable and motorist who struck child 30% liable).

[275] Lockett v. Board of Educ. for Sch. Dist. No. 189, 555 N.E.2d 536 (Ill. App. Ct. 1990) (student 40% negligent in lowering window below stop-line in violation of state rules and therefore $110,000 judgment could be reduced by $44,000).

whether a bus carrier has met the appropriate burden of proof to show that it was entirely free of negligence contributing to a six-year-old child's death,[276] or whether a parent improperly supervised the child.[277] In states where contributory negligence is a complete bar to recovery, courts frequently analyze closely the age of the child, as well as other factors surrounding the accident. In *Sharpe v. Quality Education, Inc.*,[278] an appeals court reversed a summary judgment for defendant bus company and held that the ten- or eleven-year-old student "was not contributorily negligent as a matter of law."[279] Where the facts suggest that the injured student had been injected into a position of danger due to Defendant's mechanically faulty bus, as in *Sharpe*, most courts would probably respond likewise and be loathe to preclude any possibility of recovery at the pleadings stage. In *Arnold v. Hayslett*,[280] a Tennessee trial court (in Tennessee any contributory negligence is a complete defense), after a lengthy trial, found a deceased twelve-year-old Plaintiff to have been guilty of only "remote contributory negligence" that mitigated, rather than prohibited, all recovery of damages and awarded the child's next of kin $40,000. On appeal, the Tennessee Supreme Court found the child's conduct to have been the proximate or causative force of his death and reversed the award of damages.[281] In *Peters v. Independent School District No. 657, Morristown*,[282] a jury determination that an automobile driver in a collision with a school bus was one hundred percent negligent was upheld, even though Minnesota is a comparative negligence state.

4. Other Defenses

School districts may be able to interpose a defense that the bus driver was not its employee. However, the employment connection to the school district may not always be clear. In *White v. Liberty Eylan School District*,[283] a motorist was struck be a school bus driven by a school teacher who was employed by a county school transportation department. The

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[276] Dunn v. Gentry, 653 So. 2d 783 (La. Ct. App. 1995) (where trial court had entered judgment for truck driver and bus carrier following death of six-year-old child, appeals court held that bus carrier had failed to bear burden of proof that it was entirely free of negligence leading to the death; truck driver and bus carrier each determined to be 50% at fault and $200,000 awarded to each parent).

[277] Brunson v. Dade County Sch. Bd., 559 So. 2d 646 (Fla. Dist. Ct. App. 1990); Chee Owens v. Leavitts Freight Serv., 745 P.2d 1165 (N.M. Ct. App. 1987).

[278] 296 S.E.2d 661 (N.C. Ct. App. 1982).

[279] *Id.* at 662.

[280] 655 S.W.2d 941 (Tenn. 1983).

[281] *But see* Bowers v. City of Chattanooga, 855 S.W.2d 583 (Tenn. Ct. App. 1993) (mother not guilty of contributory negligence in not being at bus stop to pick up her child where bus had arrived about 7 to 17 minutes early).

[282] 477 N.W.2d 757 (Minn. Ct. App. 1991).

[283] 880 S.W.2d 156 (Tex. Ct. App. 1994).

court refused to grant summary judgment to the district on the matter of liability because a material issue of fact existed as to whether both the district and the county controlled the teacher while he was driving the bus.[284]

The defense of sudden emergency is available in some jurisdictions, but the defense can be successfully interposed only where the facts support that the accident or injury could not have been reasonably foreseen or that the conduct of the bus driver did not contribute to the sudden emergency.[285] However, even if a bus driver were negligent and the school district were liable for damages, the school district will not be responsible for contract problems tangentially related to the accident.[286]

The use of releases to abrogate or reduce liability is very often part of a defendant's case. The question of effectiveness of a release is frequently left to the trier of fact. However, in *Bellefonte Insurance Co. v. Queen*,[287] a court found, as a matter of law, that the parents of a child killed after being struck at a crosswalk by a school bus were prevented from filing a lawsuit against the school board because of a "Special Release" they had executed. Despite the parents' claims that they had never intended to release the school board from all claims, the court found "unambiguous" the release of claims: "... we do hereby release, acquit and discharge the School Board ... from all claims and demands, actions and causes of action, damages, costs, loss of services, expenses and compensation ... and any and all known and unknown, foreseen and unforeseen damages and the consequences thereof...."[288]

Despite the above case, the use of releases has come under frequent judicial scrutiny and many courts have found ways of declaring such releases to be inapplicable.[289]

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[284] On the interplay between employment responsibilities of public and private providers of bus transportation, *see also* Hackworth v. Board of Educ. for Atlanta, 447 S.E.2d 78 (Ga. Ct. App. 1994) (personnel records of bus drivers employed by private company to transport public school children subject to state open records statute).

[285] *See Sparrow, Cogan, Foster*, and *Minton* discussed in accompanying text at *supra* notes 191-96. *See also* Singletary v. South Carolina Dep't of Educ., 447 S.E.2d 231 (S.C. Ct. App. 1994) (question as to whether bus driver faced sudden emergency for bus stalled on foggy highway was one for jury; jury returned verdict of $1,500,000).

[286] *See* Carter v. Smith, 607 So. 2d 6 (La. Ct. App. 1992) (caretaker of disabled child whose contract to transport child was canceled following collision with school bus could not recover on negligent interference with contractual rights, even though the bus driver had been at fault).

[287] 431 So. 2d 1039 (Fla. Dist. Ct. App. 1983).

[288] *Id.* at 1040.

[289] *See* Whittington v. Sowela Technical Inst., 438 So. 2d 236 (La. Ct. App. 1983) (release invalid where injuries caused through instrumentalities in the exclusive control of the school); Porubiansky v. Emory Univ., 275 S.E.2d 163 (Ga. Ct. App. 1980) (release invalid because of school's superior bargaining power). *See generally* MAWDSLEY, LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS 3-8 (3d ed. 1995).

In one recent field trip case, a defendant school attempted to argue that the students on the field trip had been involved in a joint venture, but the court found, quite correctly, that field trips do not fit the definition of a joint venture.[290] In an interesting nonliability case a new state law provided that, "School crossing guards shall be the responsibility of the local law enforcement agency having immediate jurisdiction of the crossing."[291] Although the school district had provided school crossing guards for twenty years, the district sought to avoid responsibility by claiming the local police department was the "local law enforcement agency." Although this case did not involve an injured plaintiff, the case does highlight the interest of school districts in avoiding responsibility for matters that might be areas of future litigation.

A defense may relate to statutory limitations on dollar recovery. In *Wells v. Panola County Board of Education*,[292] state statute set a dollar limit on recovery for school bus injuries to $10,000 per person and $50,000 aggregate.[293] Substantive due process and equal protection challenges to the statute by a student with over $600,000 in expenses were dismissed by the court. Even though the statute was repealed in October 1993, statutory limits on recovery may represent the only certain defense to tort lawsuits. However, as reflected by the repeal of the statute challenged in *Wells*, the balancing of different interests presents difficult public policy choices. "[The statute] balances the competing interests of fairness and proper state function ... represent[ing] the Legislature's determination that persons injured in school bus accidents should not be without remedy–and its determination that such remedy should not be without limit."[294]

If a student is injured while riding a school bus in a no-fault state, she may be able to recover against the automobile driver responsible for the accident where coverage is unavailable under her parents' automobile insurance. In *Beaugard v. Johnson*,[295] a student injured after an automobile driver struck her bus, following the driver's failure to observe a stop sign, was able to sue the driver because under New Jersey statute she was not eligible for coverage under her father's no-fault liability insurance. In addition, a bus was not an "automobile" for purposes of the state's

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[290] *Whittington*, 438 So. 2d at 236. "A joint venture is an undertaking by two or more persons to combine their property, capital, labor or skill in any combination of these elements in the conduct of a particular line of trade of general business for joint profits, thus creating the status of a partnership, although the facts do not show a formal partnership."

[291] School Dist. of Pontiac v. Township of Blomfield, 339 N.W.2d 465 (Mich. 1983).

[292] 645 So. 2d 883 (Miss. 1994).

[293] MISS. CODE ANN. §§ 37-41-39, 37-41-41 (Supp. 1994).

[294] *Wells*, 645 So. 2d at 889.

[295] 656 A.2d 1282 (N.J. Super. Ct. App. Div. 1995).

No-Fault Act and therefore the injured student had a cause of action against the driver.

III. Duty to Transport Students

A. Governance Decisions

The duty to transport school children is generally established by state statutes,[296] with state departments of education frequently maintaining general supervision over the school transportation system in the state.[297] However, the responsibility for implementing the state requirements and actually furnishing the transportation will fall upon local districts.[298] Where states have taken over the field of student transportation by means of comprehensive legislation mandating that students be transported to and from school, local governmental units will generally not be successful in applying local zoning ordinances to restrict carrying out that mandate.[299] The duty to transport students to and from school is frequently stated in most expansive terms as a matter of public policy: "In districts where the state provides aids for transportation it is in the public interest to provide equality of treatment in transporting school children of the state who are required to attend elementary and secondary schools...."[300]

B. General Financial Considerations

1. Aid Formulas

Transportation of students represents a considerable financial outlay by local school districts and thus they can reasonably be expected to resist transporting students except where specifically mandated to do so

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[296] Normally, in the absence of a statute, a school district owes no duty to transport pupils regardless of the distance they must travel. Harwood v. Dysart Consol. Sch. Dist., 237 Iowa 133, 21 N.W.2d 334 (Iowa 1946). *See* Minn. Stat. Ann. § 123.39 (West 1993) ("The board may provide for the free transportation of pupils to and from school..."); *see also* Cal. Educ. Code § 39800 (West 1993).

[297] *See, e.g.*, Iowa Code Ann. § 285.8 (1988). State supervision is frequently tied to regulations for transportation allowances. *See also* Cal. Educ. Code § 41853 (West 1993) (discontinuance of transportation results in reduction of state apportionment of funds).

[298] *See, e.g.*, Iowa Code Ann. § 285.10 (1988).

[299] *See* Bloomfield v. Davis County Community Sch. Dist., 119 N.W.2d 909 (Iowa 1963) (municipality attempted to use zoning ordinance to keep a school district from installing gasoline tanks to refuel buses); Lauderdale County Bd. of Educ. v. Alexander, 110 So. 2d 911 (Ala. 1957) (construction and maintenance of county bus barn were governmental function and therefore not a proprietary function subject to injunctive relief).

[300] *See, e.g.*, N. Y. Stat. Ann. §123.76 (West 1993). *See* Americans United, Inc. v. Independent Sch. Dist. No. 622, 179 N.W.2d 146 (Minn. 1970) (state statute authorizing transportation of all students, public and nonpublic, has a legitimate secular purpose in promoting the safety and welfare of children).

and where transportation expenses will be reimbursed by the state.[301] Transportation aid entitlement formulas are designed by state legislatures and are generally complex. Transportation aid entitlement statutes typically have three aspects to them: first, there are a series of definitions which determine eligibility for aid reimbursement;[302] second, there is a description of the formula to be used in calculating the amount of the reimbursement;[303] and third, there may be provisions for the possibility of increased adjustment in special situations.[304] Payment of transportation aid entitlements may be based on a combination of the amount of past outlays and predicted costs for the next year with final adjustment for actual authorized expenditures made during the summer following the school year in question.[305] State reimbursement may also be based on the relationship between expenses for the preceding year and the revenue limit necessary to raise that amount.[306]

2. State Reimbursement

As much as school districts would find student transportation to be more financially feasible if buses could be operated at or near student

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[301] *See, e.g.*, ILL. ANN. STAT. ch. 105, ¶¶ 5/29-2, 5/29-3.1, 5/29-3.2, 5/29-3.2a, 5/29-3.3, 5/29-3.4 (Smith-Hurd 1993) (school districts may charge for transportation for pupils less than one and one-half miles from school, for pupils to and from public and private school-sponsored activities, and for pupils from other districts).

[302] *See, e.g.*, MINN. STAT. ANN. § 124.225(1) (West 1994) (included are such definitions as "authorized cost for regular transportation" and "transportation category" by which reimbursement is determined).

[303] *See, e.g., id.* at § 124.225 (1a,3,4) (using straight line depreciation, weighted FTE's, sparsity index, and density index); FLA. STAT. ANN. § 236.083(2) (West Supp. 1994) (using density index); OHIO ADMIN. CODE ch. 3301-83-01 (1992) (amount of reimbursement depends on whether bus is board-owned, contractor-owned, or privately owned nonschool bus vehicle); S.D. CODIFIED LAWS ANN. § 13-29-15 (1991) (items to be used in determining transportation costs for reimbursement include: salaries of drivers, mechanics, and supervisors; depreciation; insurance; gasoline, tires, repair parts; maintenance at private garages).

[304] *See, e.g.*, MINN. STAT. ANN. § 124.225(7b) (West 1994) (inflation); § 124.225(7a) (West 1994) (softening formula); § 124.225(10j) (sparsity index) (West 1994).

[305] *See* MINN. STAT. ANN. § 124.225(9) (West 1994).

[306] CAL. EDUC. CODE § 41851 (West 1993) (apportionment scheme ties transportation allowance to prior year's allowance or actual cost, whichever is less). *See also* ILL. ANN. STAT. ch. 105, ¶ 5/29-5 (Smith-Hurd 1993) (reimbursement rate dependent on school district's Transportation Fund tax rate). Unequal educational expenditures per student, based on the widely varying property values among school districts, have been successfully challenged on state and federal constitutional equal protection grounds. *See* Englewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989) and Serrano v. Priest (Serrano III), 226 Cal. Rptr. 584 (Ct. App. 1986). For commentary on these recent developments in school finance law, *see* Thompson, *School Finance and the Courts: A Reanalysis of Progress*, 59 EDUC. L. REP. 945 (1990); Sparkman & Stevens, *Texas School Finance System Unconstitutional*, 57 EDUC. L. REP. 333 (1990); and Ward, *Remedies in School Finance Equity Litigation*, 36 EDUC. L. REP. 1 (1987).

capacity, schools cannot require that otherwise eligible students use the buses.[307] On the other hand, school districts may be found to have operated in an arbitrary and unreasonable manner when they refuse to furnish transportation to students otherwise unable to attend school because the expense to transport those students would be higher for those students than others.[308] However, state statutes frequently grant local districts the option of transporting students or providing payment to parents in lieu of transportation.[309] Eligibility for school transportation is most often tied to distance from the school,[310] and thus any financial reimbursement of parents in lieu of transportation would generally apply only to those beyond the maximum statutory walking distance. But children cannot be denied transportation if a state statute or constitution is interpreted as

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[307] *See, e.g.*, CAL. EDUC. CODE § 35350 (West 1993) ("No governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or guardian.").

[308] *See, e.g.*, Manjares v. Newton, 49 Cal. Rptr. 805, 411 P.2d 901 (1966). *But see* State v. Grand Coulee Dam Sch. Dist., 536 P.2d 614 (Wash. 1975) (monthly reimbursement to parents acceptable where road unsafe for buses).

[309] *See, e.g.*, ILL. ANN. STAT. ch. 105, ¶ 5/12-11.5 (Smith-Hurd 1993) (boards of education can "reimburse pupils living in a portion of such district which cannot be reached by bus or train for the reasonable cost of their transportation, or for the amount necessarily expended by them for transportation in attending a high school approved by such board"). *See also* IOWA CODE ANN. § 285.1(b)(3) (West 1988) (where "impracticable," board can require parents to transport child for which they will be reimbursed; however, parents with more than three elementary children and one high school child will not be reimbursed). The reimbursement option exists unless transportation is mandated by other statutes or court orders, *e.g.*, in the cases of handicapped students or students involved in a desegregation plan. *See* Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986) (transportation a "related service" under EHA); Washington v. Seattle Sch. Dist. No. 1, 102 S. Ct. 3187 (1982) (state prohibition against busing for racial purposes held an unlawful racial classification and improper exercise of state authority over local districts).

[310] Statutes generally specify the maximum walking distance before bus transportation will be provided. *See* FLA. STAT. ANN. § 236.083(1)(a) (West Supp. 1994) (two miles); IOWA CODE ANN. § 285.1(1)(a)(b) (1988) (two miles for elementary, three miles for high school); ILL. ANN. STAT. ch. 105, § 5/29-3 (Smith-Hurd 1993) (one and one-half miles); N.J. STAT. ANN. § 18A:39-1 (West Supp. 1994) (two miles for elementary; two and one-half miles for secondary). For an interpretation of the New Jersey statute, *see* Board of Educ. of Township of Wayne v. Kraft, 656 A.2d 1029 (N.J. 1995) (in calculating the two miles from school after school district had voted to terminate bus transportation for middle school students living less than two miles from school, district could use a private walkway because it was maintained by the district and presented no greater risk to children walking to and from school than any other sidewalk in the district). However, a state may also establish a maximum distance from home to school for which bus transportation would be provided. *See* N.J. STAT. ANN. § 18A:39-1 (West 1989) (20 miles). For an interpretation of the New Jersey statute, *see* Nelson v. Board of Educ. of Borough of Glen Ridge, 587 A.2d 1327 (N.J. Super. Ct. App. Div. 1991). The manner in which the distance is to be measured is likewise determined by statute. *E.g.*, IOWA CODE ANN. § 285.1(9) (West 1988) ("Distance to school or to a bus route shall in all cases be measured on the public highway only and over the most passable and safest route as determined by the area education agency board, starting in the roadway opposite the

requiring transportation. In *Collins v. Ritchie*,[311] the West Virginia Supreme Court ordered bus transportation for three children who lived on a dirt road not maintained by the state. In an earlier case, the court had interpreted the state's constitutional provision of a "thorough and efficient system of free schools"[312] as making education a fundamental, constitutional right in the state.[313]

State reimbursement for transportation expenses is generally determined for students beyond a maximum walking distance from home to the nearest school according to a set statutory dollar amount or rate scheme,[314] but reimbursement is possible for students within the statutory distance, such as those students designated as handicapped,[315] those for whom conditions along the walking route would be hazardous,[316] and those who live on hazardous roads.[317] Where a parent makes a claim for reimbursement, both proof of the duty of the school district to transport and obligation by the district to reimburse belong to the parent.[318] Even beyond the maximum statutory walking distance, school boards may be authorized to make payments in lieu of transportation where roads are too poor for buses to travel.[319]

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private entrance to the residence of the pupil and ending in the roadway opposite the entrance to the school grounds or designated point on bus route"). *See also* ILL. ANN. STAT. ch. 105, § 5/29-3 (Smith-Hurd 1993) ("along normally traveled roads or streets [except where] walking constitutes a serious hazard to the safety of the pupil due to vehicular traffic"). In an interesting attorney general's opinion, the Minnesota Attorney General interpreted MINN. STAT. ANN. § 124.223 (West 1994) to require the distance to be measured over the most direct public road, not "as the crow flies." Op. Att'y Gen. 166a (Aug. 25, 1961). Certain classes of persons such as the handicapped for whom transportation at any distance would be required under the various federal handicapped acts may be excluded from the statutory distance requirement. *See* MINN. STAT. ANN. § 124.223(4) (West 1994).

[311] 351 S.E.2d 416 (W. Va. 1986).

[312] W. VA. CONST. art. XII, § 1.

[313] Pauley v. Kelley, 255 S.E.2d 859 (W. Va. 1979).

[314] *E.g.*, IOWA CODE ANN. § 285.1(3) (West 1988) (reimbursement amount set at $80 per child plus 75% "of the difference between $80 and the previous school year's statewide average per pupil transportation cost, as determined by the department of public instruction"). California allows reimbursement "not to exceed the cost of actual and necessary travel" but then limits any payments to an amount determined by the school district to be its cost of transportation. CAL. EDUC. CODE § 39806 (West 1993).

[315] *See, e.g.*, MINN. STAT. ANN. § 124.223(4) (West 1994).

[316] *See, e.g.*, ILL. ANN. STAT. ch. 105, § 5/29-5 (Smith-Hurd 1993).

[317] *See, e.g.*, IOWA CODE ANN. § 285.1(b)(4) (West 1988) (reimbursement to parents living on unsatisfactory roads at rate of 28¢ per mile for parents to connect with school vehicles of transportation).

[318] Riechs v. Independent Sch. Dist. of Danbury, 257 N.W. 546 (Iowa 1935); Bruggeman v. Independent Sch. Dist. No. 4, Union Township, Mitchell County, 289 N.W. 5 (Iowa 1940); Tow v. Dunbar Consol. Sch. Dist., 206 N.W. 94 (Iowa 1926). *See generally* Annotation, 118 A.L.R. 806 (1939).

[319] IOWA CODE ANN. § 285.1(4) (West 1988); FLA. STAT. ANN. § 234.061 (West 1989).

3. User Fees

Not all transportation expenses incurred by a school district will be reimbursable by the state, and thus districts are frequently authorized by statute to charge bus users. The United States Supreme Court has held in *Kadrmas v. Dickinson Public Schools*[320] that a school district user fee charged to parents to transport children door-to-door does not violate the Equal Protection Clause. The basis for the equal protection challenge that some school boards in the state could invoke the user fee while others could not was rejected because education is not a fundamental right under the U.S. Constitution.[321] In upholding the user fee, the Court observed:

> we think it is quite clear that a State's decision to allow local school boards the option of charging patrons a user fee for bus service is constitutionally permissible. The Constitution does not require that such service be provided at all, and it is difficult to imagine why choosing to offer the service should entail a constitutional obligation to offer it free.[322]

While the state statute in *Kadrmas* permitted user fees, the total fees collected "[could] not exceed an amount equal to the difference between the state transportation payment and the local district's cost for transportation during the preceding school year."[323] The statutory challenge in *Kadrmas* was all that much more interesting because it permitted fees to be charged for normal pupil transportation.

Subsequent to *Kadrmas*, the California Supreme Court ruled that its statute permitting school districts to charge transportation fees did not violate the state's equal protection clause. Because "[California] school districts are permitted, but not required, to provide bus transportation, ... school-provided transportation may enhance or be useful to school activity, but it is not a necessary element which each student must utilize or be denied the opportunity to receive an education."[324] However, failure to consider fee waivers for special populations, such as the indigent, will

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[320] 108 S. Ct. 2481 (1988).

[321] The North Dakota Supreme Court had already ruled that the statute did not violate equal protection under the state constitutional provision that "The legislative assembly shall provide for a uniform system of free public schools ..." N.D. CONST. art. VIII, § 2. *See* Kadrmas v. Dickinson Pub. Sch., 402 N.W.2d 897, 901 (N.D. 1987) ("transportation is not a necessary element or part of the educational process and it is not an integral part of the educational system to which the constitution refers in requiring the Legislature to provide 'a uniform system of free public schools' ").

[322] *Kadrmas*, 102 S. Ct. at 2489.

[323] N.D. CENT. CODE § 15-34.2-06.1 (1993).

[324] Arcadia Unified Sch. Dist. v. State Dep't of Educ., 825 P.2d 438, 445-46 (Cal. 1992).

deprive students under the same California constitution to a fundamental right to an education.[325]

The authority to charge fees for transportation is not that unusual since many states permit user fees to be charged, although the amount of the fees tends to be limited by statute and is generally related to whether the transportation is reimbursable from state transportation aid.[326] Just which transportation expenses are reimbursable is a matter of state statute and reimbursement may apply to field trips,[327] extracurricular activities,[328] any school-sponsored activity,[329] transportation of nonpublic students,[330] or transportation of migrant children or prekindergarten children.[331] However, where district-owned buses are used to transport students in nonreimbursable situations[332] or are used to transport nonstudent groups,[333] fees can be charged for the use of buses utilizing a variety of bases for charges.[334] Where school districts transport students who reside within the maximum statutory distance, states differ as to whether the local district can charge

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[325] *See* Salazar v. Dawson, 18 Cal. Rptr. 2d 665 (Ct. App. 1993) (the result in this case was fashioned in large part because a school district refused to give any consideration at all to fee waivers for indigent students, the court did not have to address the more delicate question as to whether particular students should be awarded fee waivers).

[326] *See* MINN. STAT. ANN. § 120.74(j) (West 1993) (fees prohibited for pupil transportation for which state transportation is authorized); ILL. ANN. STAT. ch. 105, § 5/29-5 (Smith-Hurd 1993) (reimbursement cannot be claimed where transportation costs claimed under another statutory provision); *see* Board of Educ. of Township High Sch. Dist. No. 206, Cook and Will Counties v. Cronin, 388 N.E.2d 72 (Ill. App. Ct. 1979) (transportation of students from extracurricular activities not reimbursable if user fees required to be charged); CAL. EDUC. CODE § 39807.5 (West 1993) ("[fee] no greater than the statewide average nonsubsidized cost of providing such transportation to a pupil on a publicly owned or operated transit system"); S.D. CODIFIED LAWS ANN. § 13-29-17 (1991) (failure of school district to charge nonresident students for transportation results in denial of next state aid payment).

[327] *See, e.g.*, MINN. STAT. ANN. §§ 120.73(1)(g), 120.74(1)(c) (West 1993).

[328] *Id.* at § 120.73(3).

[329] *See, e.g.*, ILL. ANN. STAT. ch. 105, § 29-3.1 (Smith-Hurd 1993).

[330] *See, e.g.*, MINN. STAT. ANN. § 123.76-79 (West 1993); § 124.223(10) (West 1994).

[331] *See* FLA. STAT. ANN. § 234.01(c) (West Supp. 1994).

[332] *E.g.*, transportation to and from summer school, ILL. ANN. STAT. ch. 105, ¶ 5/29-3.2a (Smith-Hurd 1993); transportation of nonresident students, IOWA CODE ANN. § 285.1(11) (West 1988).

[333] *E.g.*, transportation for community recreation, CAL. EDUC. CODE § 39835 (West 1993); transportation of pupils to harvest during national emergency, *Id.* at § 39836; transportation for senior citizens, OHIO REV. CODE ANN. § 3327.14 (Page 1994); transportation for recreational, cultural, educational or public service programs, ILL. ANN. STAT. ch. 105, ¶ 5/29-3.4 (Smith-Hurd 1993); or transportation of adults in general, FLA. STAT. ANN. § 234.211(1a) (1989).

[334] FLA. STAT. ANN. § 234.211 (West 1989) ("reimbursement ... in full or in part"); CAL. EDUC. CODE § 39801.5 (West 1993) ("all or part of the costs" for transporting adults); ILL. ANN. STAT. ch. 105, ¶ 5/29-3.5 (Smith-Hurd 1993) ("Amount equal to the cost ... includ[ing] a reasonable allowance for depreciation of the vehicles used ... [and] reasonable amount to cover any increase in insurance premiums...."); N.D. CENT. CODE § 15-34.2-18 (1993) ("rental charge and insurance coverage").

a fee for such a service.[335] Transportation of handicapped students may involve special obligations by a school district,[336] as well as special taxing authorization.[337]

As financially desirable as the charging of fees may be, school districts have not yet faced the prospect that charging fees might enhance their liability. In *Anderson v. Shaughnessy*,[338] the Minnesota Court of Appeals refused to impose a common carrier standard of liability on district-run school buses, in part because the students paid no fees.

"In a case such as this one, where the school bus is operated by a school district *and the student pays no fare*, a school bus driver's duties are defined by the duties imposed upon school districts, not by the duties imposed upon common carriers."[339] The court distinguished this case from an earlier one where a city transit authority was being used to transport students and students were fare-paying.[340] The difference in standard of care owed to students is ordinary care versus strict liability.[341]

C. Funding of Transportation

1. Changes in Transportation Funding

Increasing demands for decreasing tax dollars, occasionally exacerbated by taxpayer refusal to approve millage increases, leads to hard choices by school boards as to how the available resources are to be allocated. In *Lintz v. Board of Education, Alpena Public Schools*,[342] a local school board voted to stop providing student transportation after voters had failed to approve a separate mill proposal. Prior to reaching its decision the board had met and balanced the funding of $800,000 for transportation against the alternatives, "increased class sizes, reduction of counseling, and cutbacks in libraries, new supplies and books."[343] The trial

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[335] Minn. Op. Att'y. Gen., 166-A-7 (Nov. 29, 1969) (fees cannot be charged); ILL. ANN. STAT. ch. 105, ¶ 5/29-2 (Smith-Hurd 1993) (charge can be made "not to exceed the cost thereof"); IOWA CODE ANN. § 285.1(11) (1988) ("pro rata cost of transportation" of nonresident students may be collected from parents). *See* Silver Lake Consol. Sch. Dist. v. Parker, 29 N.W.2d 214 (Iowa 1948) (nonpublic student could not be transported free where he resided more than statutory walking distance from nearest public school but within that distance from his nonpublic school).

[336] ILL. ANN. STAT. ch. 105, ¶¶ 5/14-1.08, 5/14-7.01 (Smith-Hurd 1993) (responsibility to transport handicapped within school district or to schools outside district); CAL. EDUC. CODE § 39807.5 (West 1993) (no charge for transporting handicapped children).

[337] ILL. ANN. STAT. ch. 105, ¶ 5/34-128 (Smith-Hurd 1993) (special tax levy to transport trainable mentally handicapped students).

[338] 519 N.W.2d 229 (Minn. Ct. App. 1994), *rev'd on other grounds*, 526 N.W.2d 625 (Minn. 1995).

[339] *Id.* at 232 (emphasis added).

[340] Jam v. Independent Sch. Dist. No. 709, 413 N.W.2d 165 (Minn. Ct. App. 1987).

[341] *See also* Kirby v. Spate, 448 S.E.2d 7 (Ga. Ct. App. 1994) (ordinary standard of care, as opposed to extraordinary diligence, appropriate concerning bus maintenance where no payment of fare involved).

[342] 325 N.W.2d 803 (Mich. Ct. App. 1982).

[343] *Id.* at 805.

court had ordered reinstatement of bus transportation, holding that this obligation was mandated by a state constitutional provision: "The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law."[344] In reversing the trial court, the state appeals court observed that the same section of the state constitution also contained language indicating that bus transportation was less than mandatory: "The Legislature *may* provide for the transportation of students to and from any school."[345] In concluding that the provision of student transportation was permissive and not mandatory under the state constitution, the court held "that the Board of Education did not abuse its discretion in deciding to stop providing transportation to and from school, in light of the shortage of funding."[346]

However, the appeals court concluded its opinion with a troubled reflection on the tensions between failure of legislatures to adequately fund education and demand for the judiciary to protect the rights of students:

> The voters of Alpena and Presque Isle have persistently refused to authorize sufficient funding to support both an adequate education system and a school transportation system. We are disturbed by the prospect that the burden of this policy may fall disproportionately upon a minority of rural families who are politically powerless to alter the situation. Be that as it may, it is the responsibility of the Legislature—and not the judiciary—to remedy any such inequity.[347]

The financial balancing process noted above in *Lintz* can produce the opposite result—taking funds from some other fund to provide for transportation. In *Ryan v. City of Philadelphia*,[348] taxpayer-Plaintiffs sought to invalidate a $3,000,000 transfer of city general funds to fund school busing on the ground that, under the state's Home Rule Act, municipalities were prohibited from regulating education.[349] In upholding the transfer, the federal district court observed that providing busing to protect citizens' health, safety, and welfare was clearly a permissible municipal function.[350]

2. Transportation and Constitutional Right to Education

Even with transportation reimbursement, local school districts may

[344] MICH. CONST. art. VIII, § 2.
[345] *Id.* (emphasis added).
[346] *Lintz*, 325 N.W.2d at 806.
[347] *Id.*
[348] 570 F. Supp. 698 (W.D. Pa. 1983).
[349] *See* PA. STAT. ANN. tit. 53, § 13219(a)(2) (Supp. 1994).
[350] *See also* Reed v. Hillsboro Pub. Sch. Dist. No. 9, 477 N.W.2d 237 (N.D. 1991) (school district transfer of funds from special reserve fund to building fund for use of building construction and maintenance was totally discretionary and therefore school district could not be subject to mandamus to transfer back the funds).

still want to reduce or eliminate student busing. Whether or not districts can do so will depend on statutory and constitutional provisions.

Attempts by school boards to cut back or eliminate bus transportation have met with challenges under state or federal equal protection clauses. Generally, this challenge has been unsuccessful. In *Sutton v. Cadillac Area Public Schools*,[351] the Michigan Court of Appeals rejected a challenge by parents that failure of a school district to provide bus transportation violated equal protection of the laws under both the state and federal constitutions. Because education is not a fundamental constitutional right under either the federal[352] or Michigan[353] constitutions, the court rejected application of a strict scrutiny compelling state interest test and observed that: "Allocation of a school district's limited funds to education-related matters other than transportation is not irrational. Equal protection does not require that government choose between attacking every aspect of a problem or not attacking the problem at all."[354] In *Shaffer v. Board of School Directors*[355] a federal district court likewise determined that a school district's decision to provide one-way instead of two-way transportation for children attending kindergarten did not violate the due process or equal protection rights of indigent parents. However, the court did order two-way busing because, under a state statute requiring school districts to provide safe and effective transportation, student needs could not be met with only one-way busing.

In those states that have interpreted their constitutions to create a fundamental constitutional right for education, the effects on the provision of transportation can be considerable. The West Virginia Supreme Court has interpreted its constitutional provision for "a thorough and efficient system of free schools"[356] to create a constitutional right to education.[357] In *Potter v. Miller*[358] where a local school board had refused to provide bus service because of impassable roads, the West Virginia Supreme Court fashioned an expansive remedy, which included in part an obligation to: "(1) Devise alternative bus routing to increase access to transportation for petitioner's children during inclement weather; (2) provide shelters for the affected school children in conjunction with the

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[351] 323 N.W.2d 582 (Mich. Ct. App. 1982).

[352] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1982).

[353] *See* East Jackson Pub. Sch. v. State, 348 N.W.2d 303 (Mich. Ct. App. 1985) (education not fundamental right under Michigan Constitution). *Contra Lintz*, *supra* note 342 at 805 where the same appeals court had earlier declared that "under the Michigan Constitution, the citizens of this state have a fundamental right to free public education."

[354] *Sutton*, 323 N.W.2d at 584.

[355] 570 F. Supp. 698 (W.D. Pa. 1983).

[356] W. Va. Const. art. XII, § 1.

[357] Pauley v. Bailey, 324 S.E.2d 128 (W. Va. 1984).

[358] 287 S.E.2d 163 (W. Va. 1981).

alternative bus routes...."[359] More recently, in *Collins v. Ritchie*,[360] the same court has fashioned an even more extraordinary remedy for children on a poorly maintained road that was under water during inclement weather and, when the children living on the road were able to travel to school, they had to cross a river on an abandoned swinging bridge, cross railroad tracks where train cars were frequently parked, and walk along a busy highway. In ordering not only the school district to provide bus transportation over the road to the children's homes, but also the state Department of Highways to increase maintenance so a bus could travel over the road, the West Virginia Supreme Court observed:

> The fundamental, constitutional right to an education is no more important to children who live on a major public thoroughfare than it is to those on Sand Creek Hollow Road [the road on which the children in this case lived]. All children have the same right to a 'thorough and efficient' education and to deny them that right because they live on an inconvenient road would be to deny them the equal protection of the laws.[361]

Not surprisingly, the West Virginia Supreme Court has also directed schools to purchase smaller or newer school buses to traverse difficult roads, or provide alternative means of transportation for children who would otherwise have no way to travel to school.[362]

Along the same lines, the Georgia Supreme Court resolved a conflict between a school district and the county as to which had the responsibility to pay for improvements to a public road in order to make it safe for students. In ordering the county to pay for the improvements the court observed that "expending school tax funds for the road improvements would stray too far from the District's principal task of educating young people...."[363]

3. Statutory Options and Limitations

Frequently, the decision whether or not to provide bus transportation

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[359] *Id.* at 165. The transportation problem in this case was exacerbated because the children's absences occasioned by the bad condition of the roads were considered under state law to be unexcused.

[360] 351 S.E.2d 416 (W. Va. 1986).

[361] *Id.* at 418.

[362] Sigmon v. Board of Educ. for County of Roane, 324 S.E.2d 352 (W. Va. 1984); Shrewsbury v. Board of Educ., County of Wyo., 265 S.E.2d 767 (W. Va. 1980). In *Collins* the importance of home-to-school transportation was emphasized because the parents had no vehicles to transport the children, and, in one case, no driver's license. 351 S.E.2d at 417.

[363] Dekalb County Sch. Dist. v. Dekalb County, 440 S.E.2d 185, 187 (Ga. 1994).

will depend on state statute interpretations. In *Hartley v. Berlin Local School District*,[364] a local school board in Ohio had provided payments in lieu of transportation to a number of parents whose children lived along a public school bus route, but who attended a nonpublic school in an adjacent district. However, state statute authorized such payments in lieu of actually providing transportation only where the state board of education had confirmed upon petition from the local board that transportation was unnecessary or unreasonable.[365] Since the local board in this case had not received prior confirmation from the state board, the local board was required to comply with the statute and provide transportation. In the subsequent case of *Pushey v. Walter*,[366] the Ohio Supreme Court had occasion to determine that a local school board could not avoid its statutory obligation to provide transportation to nonpublic students by attempting to prove through deceptively derived evidence that providing such transportation would be unreasonable. In a larger context, school districts, as suggested by the Ohio cases above, may prefer to make payments to parents in lieu of having to provide transportation. In *Stephan v. Board of Education*,[367] a local school board calculated the cost of providing bus transportation to be $350,000 to $500,000 and voted to terminate bus service. Two-thirds of the parents who had responded to a questionnaire had favored mileage reimbursement over busing; however, the state's attorney general responded by issuing a formal opinion advising the board that it had a formal duty to provide bus transportation.[368] The state supreme court resolved the conflict by determining that the state statute left the decision solely to the discretion of the local board whether to operate bus routes, to enter into mileage reimbursement contracts, or to do both.

Attempting to determine whether a school district has the responsibility to fund transportation may be very difficult where a statute is relatively new and no legal interpretation is available. The difficulty is intensified because a school district may be at risk to pay damages where transportation was not provided as determined to be required by statute. In *Hurry v. Jones*,[369] a federal appeals court, in addition to deciding that transportation is a "related service" under the Education for All Handicapped Children Act (EHA),[370] had also to decide the measure of damages

[364] 433 N.E.2d 171 (Ohio 1982).

[365] OHIO REV. CODE ANN. § 3327.01 (Page 1994).

[366] 481 N.E.2d 575 (Ohio 1985).

[367] 647 P.2d 329 (Kan. 1982).

[368] *See* KAN. STAT. ANN. § 72-8302 (1992). The statute has an apparent conflict: "board of education ... *may* provide or furnish transportation for pupils.... Every school district *shall* provide or furnish transportation for every pupil...." (emphasis added).

[369] 734 F.2d 879 (1st Cir. 1984).

[370] 20 U.S.C. § 1401(17).

for violation of the statute. In *Hurry*, parents for three and one-half years had attempted to transport their child, handicapped with cerebral palsy, to school in their own van because the school district had refused to transport the child. Eventually the district determined without notice of placement or opportunity of hearing that the appropriate placement for the child was home instruction. Finally, because the parents could no longer maneuver their child in and out of the van and because the child's physical condition had deteriorated significantly while having to wait for long periods of time in the van, the parents sought damages against the school district on a number of theories: reimbursement for transportation services provided by parents, compensatory damages for the child's loss of enjoyment of life, money damages for violating the child's rights under section 504 of the Rehabilitation Act of 1973,[371] damages under section 1983 of the Civil Rights Act,[372] and recovery of attorney fees. The federal district court awarded damages on all theories, except section 1983,[373] in the sum of almost $20,000, plus attorney fees and costs.[374] In reversing most of the damage award, the appeals court did permit $1150 to the parents for out-of-pocket expenses for driving the child to school and $4600 for their driving time, all under EHA. But the appeals court overturned the damage award for physical and emotional hardship under section 504, as well as attorney fees under that section, because Plaintiff's exclusive remedy was under EHA.

The conclusion of this section would seem to be that if education is required, whether by constitutional or statutory interpretation, school districts can be compelled to fund that transportation. The possibility exists that damages might be recoverable if school district action is particularly egregious. For the special category of students who are handicapped and for whom transportation may represent one of the services required to be furnished, the extent to which the cost of the options available should be a significant factor in determining the educational program to be selected is a difficult policy question.[375]

D. Transportation of Nonpublic Students

1. Nonpublic School Bus Transportation

To the extent nonpublic schools provide their own transportation, they will have to satisfy the same statutes and regulations as public school

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[371] 29 U.S.C. § 794.

[372] 42 U.S.C. § 1983.

[373] Section 1983 cannot be used to enforce rights adequately protected under the statute at issue. *See* Carey v. Piphus, 435 U.S. 247 (1978).

[374] *Hurry*, 560 F. Supp. 500 (D.R.I. 1983).

[375] For an excellent analysis of the policy concerns, *see* Collins & Zirkel, *To What Extent, if Any, May Cost Be a Factor in Special Education Cases?*, 71 EDUC. L. REP. 11 (1992).

districts unless exempted.[176] In some states, special statutes may address nonpublic schools. In *Traveler's Indemnity Co. v. Gonzalez*,[177] the Florida Supreme Court determined that private school buses with fewer than twenty-four seats were required by state statute to have liability coverage of $5,000, multiplied by the rated seating capacity of the bus, whichever was greater.

2. Constitutional Concerns

Since the United States Supreme Court upheld under the establishment clause of the First Amendment the right of a state to provide transportation or reimbursement in lieu of transportation to nonpublic students,[178] such transportation has survived a number of challenges under state constitutional provisions prohibiting aid or gifts of money for sectarian purposes.[179] State courts have consistently interpreted their own constitutions very narrowly to mean that transportation services go to the students and "any benefit that may inure to the nonprofit private institution is merely incidental."[180]

Treating public and nonpublic students differently can also present constitutional questions. In *McCarthy v. Hornbeck*,[181] parents of nonpublic children living in one of thirteen Maryland counties not providing for transportation of nonpublic students, challenged, on free exercise and equal protection grounds, a state statute that permitted only eleven of twenty-four counties to extend to nonpublic students the same transportation arrangements as for public school students. The parents claimed that not providing nonpublic student transportation in the thirteen counties violated their free exercise of religion to select nonpublic schools for their children, and violated equal protection because there was no rational basis for the statutory distinction. The federal district court found no free exercise problem because Maryland's transportation system "places at most an indirect economic burden on plaintiffs' right to freely exer-

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[176] *See* IND. CODE ANN. § 20-9.1-4-5(5)(a) (West Supp. 1994) (private school buses subject to same annual inspections as public school buses).

[177] 614 So. 2d 1074 (Fla. 1992).

[178] Everson v. Board of Educ., 330 U.S. 1 (1947).

[179] ILL. CONST. art. X, § 3 ("anything in aid of any church or sectarian purpose"), Board of Educ. Sch. Dist. No. 142, Cook County v. Bakalis, 299 N.E.2d 737 (Ill. App. Ct. 1973); *see* CAL. CONST. art. IV, § 30, art. IX, § 8 ("to or in aid of any religious sect" . . . "for the support of any sectarian or denominational school"), Broker v. Baker, 73 Cal. App. 2d 653 (1946); *see also* OKLA. CONST. art. II, § 5 ("directly or indirectly, for the use, benefit or support of any sect, church . . ."), Gurney v. Ferguson, 122 P.2d 1002 (Okla. 1942); *see also* ALASKA CONST. art. VII, § 1 ("for the direct benefit of any religious or other private educational institution"), Mathews v. Quinton, 362 P.2d 932 (Alaska 1961).

[180] Nebraska v. School Dist. of Lincoln, 320 N.W.2d 472, 476 (Neb. 1982). *See also* Honohan v. Holt, 244 N.E.2d 537 (Ohio Ct. C.P. 1968).

[181] 590 F. Supp. 936 (D. Md. 1984).

cise their religion,"[382] and no equal protection violation because Maryland's transportation arrangement "is rationally related to the State's valid goal of conserving limited financial resources."[383] In other words, a state "is [not] constitutionally required to subsidize the transportation of [nonpublic] children to [their] schools."[384]

In *Novak v. Revere Local School District*,[385] parents of nonpublic students challenged, on equal protection grounds, an Ohio statute[386] which permitted reimbursement only where transportation travel time was thirty minutes or less. Applying a rational basis standard,[387] the court found the statute had a rational basis for creating a classification for transportation or reimbursement based on distance or travel time.

As in *McCarthy* above where the failure to provide nonpublic student bus service may be challenged on free exercise grounds, a statute providing for transportation of nonpublic students also can be challenged on establishment clause grounds. In *Members of the Jamestown School Committee v. Schmidt*,[388] a federal appeals court had to decide the constitutionality of a Rhode Island statute which provided for transportation of nonpublic students beyond school district limits. The state statute stated that a public school district in which school-age children resided must provide transportation to and from the children's schools (public and nonpublic alike) only if the children "live at such distances from the schools which they attend as to make it impractical or hazardous to require [them] to walk to school."[389] The statute was challenged under the establishment clause because nonpublic students were frequently being bused to their schools in neighboring public school districts. By allowing interdistrict transportation for nonpublic students the district court found the law violative of the establishment clause because the law "provides sectarian school children with 'greater options at greater public expense than their public school counterparts' and administrative contacts to coordinate the program together with the risk of political division along religious lines created 'an excessive entanglement of church and state.' "[390] In reversing the district court, the court of appeals concluded that:

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[382] *Id.* at 945.
[383] *Id.* at 947.
[384] *Id.* at 941.
[385] 583 N.E.2d 1358 (Ohio Ct. App. 1989).
[386] OHIO REV. CODE ANN. § 3327.1 (Page 1994). The statute was challenged under the state equal protection clause, OHIO CONST. art. I, § 2.
[387] *Novak*, 583 N.E.2d at 1361 (Ohio in interpreting its own equal protection clause follows San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), in finding that there is no fundamental constitutional right to education).
[388] 699 F.2d 1 (1st Cir. 1983).
[389] R.I. GEN. LAWS § 16-21.1-1 (1988).
[390] *Jamestown*, 699 F.2d at 3 (quoting Members of the Jamestown Sch. Comm. v. Schmidt, 525 F. Supp. 1045 (D.R.I. 1981)).

> So long as public and sectarian children are bused *to their own schools*, and the same standard of remoteness applies to public and sectarian students alike, the fact that public students are ordinarily ineligible for busing to schools beyond district lines does not render [the statute] invalid under the Establishment Clause or the Equal Protection Clause.[391]

However, the court did add one caveat, that the differences in expenditures between the relative costs of busing nonpublic as opposed to public school students may "become so grossly disproportionate as to breed political divisiveness along religious lines."[392]

But use of public funds for the transportation of nonpublic students may run afoul of state constitutional provisions. In *Fiscal Court of Jefferson County v. Brady*,[393] transportation funds paid directly into the accounts of religious schools violated the state constitution,[394] in part because the private schools mingled their own funds with the public funds and then controlled how the money should be spent on transportation.[395] The court distinguished between "financial aid ... provided [directly] to the school rather than a transportation service to the child,"[396] which is no different from "providing [an impermissible] salary supplement or a maintenance supplement to the school...."[397]

The issue as to whether a school district is providing services impermissibly direct to the religious school or permissibly for the benefit

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[391] *Id.* at 8 (emphasis in original). *See also* Cumberland Sch. Comm. v. Harnois, 499 A.2d 752 (R.I. 1985) where court upheld transportation of nonpublic students to nonpublic school in same region, even though in a different town. In addition, *see* Snyder v. Charlotte Pub. Sch. Comm., 365 N.W.2d 151 (Mich. 1984) where constitutionality of state statute upheld requiring that nonessential elective courses in public schools be offered on time-sharing basis with nonpublic students. *But see* Americans United for Separation of Church and State v. Benton, 413 F. Supp. 955 (D.D.C. 1976) where transporting students to a nonpublic nonresident district school was held to violate the establishment clause. *See also* Monroe-Woodbury Sch. Unit of Orange County v. Local 836 of Civil Serv. Employees Ass'n Local 1000, AFSCME, AFL-CIO, 659 F. Supp. 1450 (S.D.N.Y. 1985) (school assignment of only male bus drivers to area where religious sect believed male children could ride only in buses driven by males held to violate establishment clause and title VII).

[392] *Jamestown*, 699 F.2d at 10.

[393] 885 S.W.2d 681 (Ky. 1994).

[394] Ky. Const. §§ 5, 189 "[state may not extend] preference ... to any religious sect, society, or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity. ... No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school."

[395] *Fiscal Court*, 885 S.W.2d at 684.

[396] *Id.* at 685.

[397] *Id.* at 686.

of the child has been shaped most recently by the emergence of constitutional protection for religious speech and constitutional prohibition of viewpoint discrimination. In *St. James Church v. Board of Education of the Cazenovia Central School District*,[398] the school district had ceased leasing its publicly owned school buses to a church for the purpose of transporting elementary children during the school day to the church for released time for religious education. The school district had reasoned that leasing the buses violated the New York State Constitution which prohibits the use of tax dollars to advance religious purposes,[399] but the court responded that "[t]he District is not providing a service but selling a service to a not-for-profit corporation for legislatively approved purposes."[400] In addition, the court reasoned that refusal to lease the buses amounted to a form of viewpoint discrimination prohibited by the Supreme Court in *Lamb's Chapel v. Center Moriches Union Free School District*.[401]

The debate regarding state provision of transportation for nonpublic students has re-emerged as a significant legal issue. Twenty-four states permit or require transportation of nonpublic students[402] while only two have expressly ruled unconstitutional, under state constitutions, the provision of transportation to nonpublic students.[403] The most heated current debate concerns three states which permit payment to parents in lieu of transportation, an option which parents generally consider financially inadequate.[404]

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[398] 621 N.Y.S.2d 486 (Sup. Ct. 1994).

[399] N.Y. Const. art. XI, § 3.

[400] *St. James Church*, 621 N.Y.S.2d at 487. The state statute provided that: "The board of education of any school district is hereby authorized and empowered to rent or lease for such consideration as may be determined by such board, a motor vehicle or vehicles owned by respective school district during any time when such vehicle or vehicles are not needed for transportation of such children, which are otherwise used for the transportation of the school children of such district to: . . . (h) any not-for-profit organization. . . ." N.Y. Educ. Law § 1501-b(1)(h) (McKinney Supp. 1995).

[401] 113 S. Ct. 2141 (1993) (school district refusal to permit after-6:00 p.m. use of public school for film series on child-rearing sponsored by a church violative of free speech as viewpoint discrimination because other speakers had been permitted to use facility on same subject of child-rearing). The holding in *Lamb's Chapel* that government cannot discriminate in providing resources on the basis of viewpoint was reinforced in Rosenberger v. Rector and Visitors of Univ. of Va., 115 S. Ct. 2510 (1995) (university violated free speech rights of recognized student organization when it refused to make third-party payment to vendor for publication of student journal with articles on current topics discussed from a Christian perspective).

[402] Laura Miller, *Transportation Aid for Private Pupils Debated*, Educ. Wk., June 7, 1995, 1, 8-9 (Ariz., Cal., Conn., Del., Ill., Ind., Iowa, Kan., Me., Mass., Mich., Minn., Mont., Neb., Nev., N.H., N.Y., N.D., Ohio, Or., Pa., R.I., Wash., Wis.).

[403] *Id.* at 8 (Haw., Idaho).

[404] *Id.* (the three states are La., N.J., W. Va.).

3. Statutory Concerns

However, the absence of a constitutional prohibition regarding provision of public transportation for nonpublic students does not mean that such provision may not have been limited by statute. For example, Ohio, in providing for transportation of nonpublic students, has enacted a provision that: "No transportation of any pupils shall be provided by any board of education to or from any school which in the selection of pupils, faculty members or employees, practices discrimination against any person on the grounds of race, color, religion, or national origin."[405] Whatever that provision may mean in terms of limiting the furnishing of transportation, the same Ohio statute declares that "the board of education shall provide transportation for [nonpublic] pupils to and from [a nonpublic] school except when, in the judgment of such board, confirmed by the state board of education, such transportation is unnecessary or unreasonable."[406]

In *Haig v. Ohio State Board of Education*,[407] the Ohio Supreme Court appeared to uphold a school board refusal for 1986-87 to provide transportation for students residing on Kelley's Island in Lake Erie to a nonpublic school on the mainland where the cost for providing air transportation for six students for 1984-85 had exceeded $20,000 and the anticipated cost for 1986-87 for only two students was anticipated to be $13,500.

A more common source of conflict concerns attempts by local districts to utilize transportation arrangements for nonpublic students other than public school buses. The conflict invariably arises because state legislatures have declared that students attending nonpublic schools within the district are to be treated the same as, or similar to, public school studen.[408] In *St. John Vianney School v. Board of Education of School*

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[405] OHIO REV. CODE ANN. § 3327.01 (Page 1994). State department of education regulations would appear to make ineligible for public transportation students at any nonpublic institution that discriminates in employment or student admissions on the basis of religious qualifications. *Cf.* OHIO ADMIN. CODE ch. 3301-35-02(1) *with* 3301-35-08 (1992). However, in Honohan v. Holt, 244 N.E.2d 537 (Ohio Ct. C.P. 1968) the provision of transportation to religious schools was found not to violate the OHIO CONST. art. I, § 7, which provides that "no person shall be compelled to . . . support any place of worship . . ."

[406] OHIO REV. CODE ANN. § 3327.01 (Page 1994).

[407] 584 N.E.2d 704 (Ohio 1992).

[408] IOWA CODE ANN. § 285.1(14) (1988) ("Resident pupils attending a nonpublic school located either within or without the school district of the pupil's residence shall be entitled to transportation on the same basis as provided for resident public school pupils under this section."); CAL. EDUC. CODE § 39808 (West 1993) ("Transportation upon the same terms and in the same manner and over the same routes of travel as is permitted pupils attending the district schools."). *See also* ILL. ASS. STAT. ch. 105, ¶ 5/29-4 (Smith-

District of Janesville,[409] five private schools located in the city of Janesville sought to compel the school board to furnish the same door-to-door bus service for nonpublic elementary students more than two miles from school as was provided public and nonpublic school students less than two miles. The state statute required that there be "reasonable uniformity in the transportation furnished such pupils whether they attend public or private schools."[410] Under a legislative "city option" provision, the city had elected to provide free transportation to all public and private school children more than two miles from school "either through the Janesville Transit System buses or through an individual contract with the child's parent or guardian."[411] The trial court found that private school children using city buses were exposed to greater hazards than those children within the two miles who had door-to-door service and therefore there was not "reasonable uniformity." In reversing the trial court, the appeals court observed that the "reasonable uniformity required is directed at the distance pupils are transported and not at the means chosen."[412] The appeals court went on to justify in the following manner any inequities its interpretation might create: "Public schools usually serve neighborhoods. Private schools may serve much larger areas, even entire municipalities. As a result, the average distance that pupils live from their public schools may be substantially less than the average distance pupils live from their private schools in the same city."[413]

Statutory obligations to transport students to nonpublic schools generally have received restrictive interpretation when applied to transportation outside the school district. Massachusetts provides that "pupils who attend approved private schools of elementary and high school grades shall be entitled to the same rights and privileges as to transportation as are provided for pupils of public schools...."[414] This has been interpreted to mean that transportation of nonpublic students outside the district is

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Hurd 1993) where a public school district is authorized to operate separate bus routes for nonpublic students where such routes would be "safer, more economical and more efficient." The Minnesota Attorney General has interpreted MINN. STAT. ANN. § 124.223 (West 1994) providing for equal transportation of both public and nonpublic students to mean that if a school district elects to transport secondary students who live between one and two miles from a district school, it must also transport nonpublic secondary students who reside the same distance from their nonpublic schools. Op. Att'y. Gen., 166a-7, June 3, 1983.

[409] 336 N.W.2d 387 (Wis. Ct. App. 1983).

[410] WIS. STAT. ANN. § 121.54(11) (West 1997).

[411] *St. John Vianney Sch.*, 336 N.W.2d at 389.

[412] *Id.* at 393.

[413] *Id.* at 394.

[414] MASS. GEN. LAW ANN. ch. 76, § 1 (West 1982).

not required as long as such transportation is not provided for public students.[415] Where an all-girls' religious school was located outside a public school district and the only religious school of the same faith within the district was an all-boys' school, the school district had not violated equal protection by refusing to transport a female student to the all-boys' school from which she could secure private transportation to the all-girls' school. Language of the statute was considered to be gender neutral. "Each school committee shall provide transportation for any pupil attending such an approved private school within the boundaries of the school district"[416] ... and refusal to transport the student to an all-boys' school within the district in order that she could get a ride to the out-of-district all-girls' school was the result of physical location and not gender discrimination.[417]

Minnesota, under its Equal Transportation Act,[418] permits public school boards to transport nonpublic students to nonpublic schools in another public school district "if transportation is to schools maintaining grades or departments not maintained in the district or if attendance of such children at school can more safely, economically, or conveniently be provided for by such means." However, in *Eldredge v. Independent School District No. 625*,[419] the Minnesota Court of Appeals refused to require the Defendant public school district to transport nonpublic school students to a nonpublic school in another district simply because the school in the other district had courses of study not available in the nonpublic students' current nonpublic school. Courses of study in areas such as performing arts, visual arts, foreign languages, and laboratory sciences which existed in the nonpublic school in the other district but not in the current nonpublic school, did not constitute "departments" within the meaning of the statute.

In *Healy v. Independent School District No. 625*,[420] the Eighth Circuit Court of Appeals upheld the right of a school district to refuse transportation to a Lutheran school outside the district because five Lutheran schools existed within the district, even though none belonged to the same Lutheran denomination as the out-of-district school. Schools with different Lutheran affiliations did not constitute separate "departments" within the meaning of the statute and school districts "should not

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[415] Garon v. Dudley-Charlton Regional Sch. Comm., 635 N.E.2d 1051 (Mass. Ct. App. 1994).
[416] MASS. GEN. LAWS ANN. ch. 76, § 1 (West 1992).
[417] Fedele v. School Comm. of Westwood, 587 N.E.2d 757 (Mass. 1992).
[418] MINN. STAT. ANN. § 123.78(1)(b) (West 1993).
[419] 422 N.W.2d 319 (Minn. Ct. App. 1988).
[420] 962 F.2d 1304 (8th Cir. 1992).

be required to engage in the theological hairsplitting of comparing sectarian schools."[421]

Where a student attends a nonpublic school outside his/her public school district of residence, conflict can arise between public school districts as to which bears the cost of transportation. In *Bethlehem Area Vocational-Technical School District v. Palisades School District*,[422] the vo-tech school district sought to recover from a student's district of residence (Palisades School District) costs of transporting the student from a parochial school within its district to its vo-tech school. However, the court determined that under Pennsylvania's Public School Code the district of residence was not required to reimburse transportation expenses where it had its own vo-tech program. Reimbursement was not required simply because attendance at a vo-tech school in a neighboring district was more convenient to the student's nonpublic school.

Public school districts may prefer to reimburse nonpublic school parents for transporting their own children rather than providing the actual transportation. In *Janasiewicz v. Board of Education of the County of Kanawha*,[423] the West Virginia Supreme Court considered this option under its transportation statute. In *Janasiewicz*, parents of parochial students sought an order requiring the county board of education to provide school bus transportation for their children to and from parochial schools. State statute required that "adequate means of transportation" be provided "for all children of school age."[424] In ruling that the county need only provide "a full monetary stipend and permission to ride school buses on regularly scheduled (public) bus routes,"[425] the court found that there is a rational basis for distinguishing between public and parochial school children. "All children under sixteen years old are required to attend approved schools; but a parochial school student has chosen to reject a free public school education in favor of a privately paid education emphasizing religious beliefs and principles."[426]

Not all states interpret their transportation statutes requiring similar treatment of public and nonpublic children in the same manner as the courts mentioned above. In *State ex rel. Bouc v. School District of Lincoln*,[427] a state statute provided, in part, that a public school district, which provided transportation to public school children, must also furnish transportation for nonpublic school children. The state statute clearly seemed

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[421] *Id.* at 1307.
[422] 625 A.2d 1330 (Pa. Commw. Ct. 1993).
[423] 299 S.E.2d 34 (W. Va. 1982).
[424] W. Va. Code § 18-5-13(6)(a) (West 1994).
[425] Janasiewicz, 299 S.E.2d at 38.
[426] *Id.*
[427] 320 N.W.2d 472 (Neb. 1982).

to require that the school district must provide transportation for school children residing more than one and one-fourth miles from school, but the school district had refused to transport similar nonpublic school children on the same route. The state supreme court held that the clear legislative intent was to provide the same benefits to nonpublic students as were provided public students and therefore bus service had to be provided.

In *Pushey v. Walter*,[428] a public school district ran afoul of an Ohio statute[429] which permitted local schools to pay the cost to parents of transporting nonpublic school children rather than transport the children themselves where the district had received prior confirmation from the state department of education that such transportation would be "impractical." The Ohio Supreme Court ordered that transportation be provided nonpublic school children in this case because, in attempting to prove that the transportation was "impractical," the district had deceptively included travel item figures generated by having bus drivers drive around in empty buses, had inflated bus driver wages by twenty-five percent, and had greatly understated the number of students to be transported.

4. Private School Placement for Students with Disabilities

Transportation expenses pertaining to placement of handicapped students in private schools has been a special area of litigation under EHA and its successor statute, IDEA. With the Supreme Court's decision in *Florence County School District Four v. Carter*,[430] unilateral parental placement of children received a new lease on life and will probably lead to much litigation as to the expenses that can be recovered where such placement is found to be appropriate. Whether, where a public school district has failed to provide a free appropriate public education (FAPE), all expenses incurred by parents in sending their child to a private placement will be reimbursable, including transportation, remains to be seen. A recent post-*Florence County* appeals court decision indicates that expenses such as transportation, lodging and attorneys' fees are recoverable in private placement cases where a school district has failed to provide a FAPE.[431] However, earlier pre-*Florence County* cases reflected a less expansive approach to reimbursement and such an approach may indeed still play a factor in reimbursement litigation under IDEA.

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[428] 481 N.E.2d 575 (Ohio 1985).

[429] OHIO REV. CODE ANN. § 3327.01 (Page 1994).

[430] 114 S. Ct. 361 (1993) (school district reimbursement of tuition costs ordered on the basis of the public school district's failure to provide a free appropriate public education under IDEA, even though the out-of-state school selected by the parents was not on the state's approved list of private schools).

[431] Union Sch. Dist. v. Smith, 15 F.2d 1519 (9th Cir. 1994).

In *Bales v. Clarke*,[432] parents placed their handicapped child in a private out-of-state school for handicapped children because the public school district had allegedly failed under both the state and federal statutes to provide a "free and appropriate education."[433] In denying the parents' request for reimbursement for transportation expenses to visit their child, the court observed that "neither the Virginia statute, the Virginia regulations, nor the federal act provide funding expenses for parents' transportation."[434] Likewise, parents could not invoke the EHA [IDEA] to provide transportation to a nonpublic school where no relationship exists between the child's need for transportation and the child's impairment. In *McNair v. Oak Hills Local School District*,[435] a federal appeals court determined that a student, who did not meet the time-traveled requirement to qualify under state statute[436] for free bus transportation to her nonpublic school, could not invoke the EHA where her impairment (deafness) had no relationship to her need for transportation. Similarly, parents could not recover the full cost of transporting their orthopedically handicapped child to a private school where the child was not receiving any special education at the private school.[437]

E. Transportation for Special Student Needs

1. Constitutional Concerns

The obligation of public school districts to provide transportation for students with disabilities depends largely on state and federal statutes, although occasionally constitutional issues are litigated. In *Kennedy v. Board of Education, McDowell County*,[438] the West Virginia Supreme Court found a local school board had denied two elementary-age children with spina bifida equal protection of the laws by refusing to send a bus driver down a private road to pick them up. Since the road was not safe for a large bus, the school district was ordered to purchase a smaller bus that could traverse the dirt road. In *Felter v. Cape Girardeau School District*,[439] transportation of a disabled student from the sidewalk outside her parochial school to a public school did not violate the establishment

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[432] 523 F. Supp. 1366 (E.D. Va. 1981).

[433] 20 U.S.C. § 1412(a); VA. CODE § 22.1-214(A) (1993).

[434] *Bales*, 523 F. Supp. at 1370.

[435] 872 F.2d 153 (6th Cir. 1989).

[436] *McNair*, 872 F.2d at 154-55. To qualify for free bus transportation the student had to live more than two miles from the nonpublic school, but the direct driving distance could not exceed 30 minutes. In this case, the student lived more than two miles from school but the driving time was 34 minutes.

[437] A.A. v. Cooperman, 526 A.2d 1103 (N.J. Super. Ct. App. Div. 1987).

[438] 337 S.E.2d 905 (W. Va. 1985).

[439] 810 F. Supp. 1062 (E.D. Mo. 1993).

clause because this service under IDEA would benefit the student, not the parochial school.

2. Transportation Under IDEA

However, most of the recent litigation in the field involves the Rehabilitation Act (section 504)[440] and the Individuals with Disabilities Education Act (IDEA).[441] Public school districts have a duty under IDEA to provide a free appropriate education and as long as that requirement is being met at one public facility, a district has no obligation to transport a student to another public facility.[442] No reimbursement is required for transportation of a hearing impaired student to a private school where teachers were able to sign, as long as the IEP in the public school the student was attending could maximize the student's potential in the "least restrictive environment" (in this case, mainstreaming).[443]

As noted earlier, transportation can be a "related service" under EHA [IDEA].[444] In *Department of Education, State of Hawaii v. Katherine D.*,[445] parents of a child with tracheomalacia[446] wanted their child educated in a regular education class in a public school, with itinerant special education speech and language services provided as well. The parents would permit their daughter to attend public school only if trained persons were available to respond to her health needs, mainly to suction excess mucus as necessary from her lungs, to administer medication before she ate lunch, and to reinsert her tracheotomy tube should it become dislodged. The state department of education recommended home instruction for the child since the public school did not have the continuous services of a medically trained person should an emergency situation

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[440] 20 U.S.C. § 794.

[441] 42 U.S.C. § 1401 *et seq.* State disability statutes are frequently involved in litigation and tend to be very similar in language to the federal statute. *See, e.g.*, School Dist. of Phila. v. Commonwealth Dep't of Educ., 547 A.2d 520 (Pa. Commw. Ct. 1988) ("appropriate education" under state statute required that school district provide transportation to special training class for child with progressive hearing loss).

[442] School Bd. of Pinellas County v. Smith, 537 So. 2d 168 (Fla. Dist. Ct. App. 1989).

[443] Barwacz v. Michigan Dep't of Educ., 681 F. Supp. 427 (W.D. Mich. 1988).

[444] *See supra* note 369 and accompanying text. *See, e.g.*, Aaron S. v. Westford Pub. Sch., 1987-88 EHLR Dec. 509:122 (school district responsible for tuition and transportation costs regarding private placement by parents without exhausting administrative review as result of inadequate IEP by public school district under EHA).

[445] 531 F. Supp. 517 (D. Haw. 1982).

[446] This condition means that the walls of the windpipe are floppy and not rigid. The child in this case had a tracheotomy with the tracheotomy tube held in place by surgical strings. The tube enabled her to breathe and expel secretion from her lungs.

arise.[447] That offer by the public school district was found by a hearing officer not to be "a 'free appropriate education' in the 'least restrictive environment.' "[448] In ruling against the state department of education, the federal district court held "the DOE (department of education) must pay for a private placement when such assistance is available at no cost at a private school and Katherine D. can then avoid the confining and adverse impact of a home tutoring program."[449] In addition to requiring the public school district to pay tuition to a private school, the federal court held that "Katherine D. is entitled to transportation and a school-based education with special attendants at DOE expense."[450] In a similar vein, a school district can have a duty to provide, as a "related service," transportation for a handicapped child to a custodian outside the district where the child was determined to need a full-time summer school placement in order to prevent substantial regression of knowledge and skills, but the district had only provided a half-day, one-month summer program without transportation and the parent needed the custodial care until she could pick up the child.[451]

Transportation can also be a "supportive service" under EHA [IDEA]. In *Macomb County Intermediate School District v. Joshua*,[452] the federal district court was directly faced with the question whether EHA required the school district to continue providing not only transportation for a severely multiply impaired student currently enrolled in a school within the district, but also a person to assist the student should any complications arise during transportation concerning the suctioning of the student's

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[447] This case highlights the tensions which exist between attempts to place children in the "least restrictive environment" and uncertainty by school personnel whether they can or should perform medical procedures that might be necessary to save a life. In *Katherine D.*, the administrators and three teachers in the public school to which the child had been assigned filed a grievance through their union "charging violation of their contracts of employments by being required to perform duties of a medical nature outside the scope of their contractual duty." 531 F. Supp. at 524. The U.S. Supreme Court has addressed this problem in part in Irving Indep. Sch. Dist. v. Tatro, 102 S. Ct. 3371 (1984) when the Court determined that catheterization which could be furnished by a trained lay person was a "related service" under EHA and not a "medical service." For a discussion of legal issues related to providing services to children with disabilities that might appear medical in nature, see MAWDSLEY, LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS 30-33 (3d ed. 1995).

[448] *Katherine D.*, 531 F. Supp. at 523.

[449] *Id.* at 523.

[450] *Id.* The court also emphasized "that the aid Katherine D. needs can be—and for some years has been—provided by trained people; that the necessary skills can be learned at no cost in a matter of hours." This court was slightly ahead of the U.S. Supreme Court's decision in *Tatro*, *supra* note 447.

[451] Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153,1159 (5th Cir. 1986) ("such transportation does not cease to be a related service simply because a parent requests transportation to a site a short distance beyond the district boundaries").

[452] 715 F. Supp. 824 (E.D. Mich. 1989).

tracheostomy tube. After analyzing several cases, including *Katherine D.* and *Tatro*, the court determined that "the transportation of the [student] to and from school represents supportive services under the [EHA]"[453] and "the medical services exclusion [in EHA] is limited to services provided by a licensed physician."[454]

In *Fallon v. Scotch Plains-Fanwood Board of Education*,[455] a state court addressed a different kind of handicapped child situation with implications for pupil transportation. In *Fallon*, Plaintiff-parents had placed their child in a private day school for neurologically impaired children because the public school district, where the child had attended for nine and one-half years, had refused to change the child's classification "from 'multiply handicapped,' with her primary handicap being educable mentally retarded, to 'neurologically impaired.'"[456] Plaintiffs sought a $16,000 reimbursement for two and one-half years of expenses at the private school. The issue before the court was whether the lack of responsiveness of the public school district to Plaintiff's requests justified placement in the private school without the parents having exhausted their administrative remedies under EHA.[457] Not only was the school district ordered to reimburse the parents in *Fallon*, but because the school district's refusal to reimburse was considered to be "substantially unwarranted and unreasonable," the district was ordered to pay also $3926 interest on the sum required to be reimbursed. More recently, parents of an autistic child,

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[453] *Macomb*, 715 F. Supp. at 827.

[454] *Id.* at 828.

[455] 447 A.2d 607 (N.J. Super. Ct. App. Div. 1982).

[456] *Id.* at 608.

[457] The issue of exhaustion of remedies under EHA is very important and much litigated. Under the statutory "stay-put" rule, a child must stay in his/her current placement until the administrative review process is completed. Generally, parents of a handicapped child will not be reimbursed for expenses incurred in removing a child from a public school placement and placing the child in a private placement before the administrative review process is over. *See* Newport-Mesa Unified Sch. Dist. of Orange County v. Hubert, 183 Cal. Rptr. 334 (Ct. App. 1982) (no reimbursement for costs of child's private schooling incurred during pendency of administrative proceedings held to determine placement); Stacy G. v. Pasadena Indep. Sch. Dist., 695 F.2d 949 (5th Cir. 1982) (state only obligated to maintain level of funding prior to parents' placement in private school while administrative process was underway). *See also* Board of Educ. of N.Y. v. Ambach, 612 F. Supp. 230 (E.D.N.Y. 1985) (initial placement of handicapped child in private school pursuant to court order became current placement under EHA and school board responsible for tuition until review proceedings completed). *Contra* Blomstrom v. Massachusetts Dep't of Educ., 550 F. Supp. 707 (D. Mass. 1982) (school committee responsible for day portion of private placement by parents because of committee's failure to design appropriate placement, but not for nonday portion of private residency expenses because the parent placement had occurred prior to exhaustion of administrative review); Parks v. Pavkovic, 557 F. Supp. 1280 (N.D. Ill. 1983) (parents not responsible for exhausting administrative appeal where state agency had refused to decide the parents' administrative appeal).

who placed their child in a private counseling facility after the public school district had failed to adequately design a program to meet his special needs, were entitled to recover the cost of placement, including reimbursement for commuting to the facility, as well as lodging and attorney fees.[458]

3. Remedies Under IDEA and Section 504

Beyond the matter of reimbursement for expenses involved in private placement, IDEA does not appear to offer the possibility of recovering money damages under an IDEA private suit or the possibility of using other statutes such as section 1983 to recover damages under IDEA. In *Hurry v. Jones*[459] a federal appeals court struck down damage awards made to parents suing under EHA where the awards had been based on section 504 remedies. In *Smith v. Robinson*[460] the United States Supreme Court settled the matter by interpreting EHA [IDEA] to be a comprehensive scheme to aid the states in complying with the constitutional obligation to provide public education for the handicapped. In *Smith*, the Plaintiff-parents could not circumvent EHA by seeking damages under section 1983 for equal protection violations, nor could they enlarge the EHA remedies by seeking damage recovery under section 504 of the Rehabilitation Act.[461] While reimbursement of expenses is clearly permitted now under IDEA,[462] courts conflict as to whether compensatory services or damages must be provided to a student with a disability denied appropriate services during his/her period of entitlement.[463]

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[458] Union Sch. Dist. v. Smith, 15 F.2d 1519 (9th Cir. 1994). *See also* Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467 (9th Cir. 1993) (public school district required to reimburse tuition for unilateral private placement plus cost of transporting child with multiple disabilities from residence to private school).

[459] *Supra* notes 369-74 and accompanying text.

[460] 468 U.S. 992 (1984).

[461] *See also* Sanders v. Marquette Pub. Sch., 561 F. Supp. 1361 (W.D. Mich. 1983) (money damages not recoverable in private suit under EHA even if education officials acted in bad faith).

[462] Burlington Sch. Comm. v. Department of Educ., 471 U.S. 359 (1985).

[463] *Cf.* Ft. Zumwalt Sch. Dist. v. Missouri State Bd. of Educ., 865 F. Supp. 604 (E.D. Mo. 1994); Kelly K. v. Town of Framingham, 21 IDELR 128 (Mass. App. Ct. 1994); Alexopulos v. San Francisco Unified Sch. Dist., 817 F.2d 551 (9th Cir. 1987) (compensatory services not available) *with* Doe v. Withers, 20 IDELR 422 (W. Va. Cir. Ct. 1994) (verdict rendered against teacher, who refused to do testing accommodation in student's IEP, for $5,000,000 compensatory damages and $10,000,000 punitive damages); Pihl v. Massachussetts Dep't of Educ., 9 F.3d 184 (1st Cir. 1993) (courts can award compensatory services to student over 21 with disability where IDEA violation occurred prior to age 21 when student was entitled to services); Manchester Sch. Dist. v. Christopher B., 807 F. Supp. 860 (D.N.H. 1992) (compensatory services required if no FAPE).

Formerly, successful plaintiffs had been prevented from recovering attorney fees in IDEA cases under civil rights statutes, even if the claim was designated as a due process claim.[464] However, IDEA was amended in 1986 to permit recovery of attorney fees.[465] As suggested in *Smith*, damages and attorney fees are recoverable in section 504 actions.[466] But damages or reimbursement based on IDEA or section 504 obligations are no longer recoverable from a public school district after a disabled student has been admitted to college.[467]

4. Transportation of Mentally Gifted

A topic that appears to attract little legal attention is the obligation for school districts to provide transportation under state statutes that require special programs for "mentally gifted" students. In *Woodland Hills School District v. Commonwealth Department of Education*,[468] a Pennsylvania state statute was interpreted as defining the "mentally gifted" as those with an IQ over 130 who needed special services or activities not ordinarily provided in the regular program.[469] The programs were open to both public and nonpublic students and, in developing its program, defendant district had designed a half-day weekly program in one of its elementary schools to and from which nonpublic students were transported. However, the district changed its gifted program to provide gifted instruction in each elementary school and used itinerant teachers, and in the process eliminated transportation for nonpublic students. Nonpublic school parents successfully sued the district alleging their children were being denied their rights to special education under the state statute. In upholding the parents' claim the court ordered the school district to provide either mid-day transportation or board and lodging to nonpublic students in the gifted program.

But the right of students in Pennsylvania to an IEP as an "exceptional student"[470] "[did] not entitle a gifted student to private school placement or out-of-state placement" in *Ellis v. Chester Upland School*

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[464] Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986).

[465] 20 U.S.C. § 1415 (e)(4)(B).

[466] *See* Rothschild v. Grottenthaler, 716 F. Supp. 796 (S.D.N.Y. 1989) (section 504 does not prohibit section 1983 action based on handicap discrimination).

[467] Chuhran v. Walled Lake Consol. Sch., 839 F. Supp. 465 (E.D. Mich. 1993).

[468] 516 A.2d 875 (Pa. Commw. Ct. 1986).

[469] *See* PA. STAT. ANN. tit. 34, § 13-1371 (1992) ("exceptional children" currently defined as "children of school age who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special educational facilities or services....").

[470] Like for any special education student, gifted students must be provided IEPs which are "individualized" and which are "reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress." Ellis v. Chester Upland Sch. Dist., 651 A.2d 616, 619 (1994).

District.[471] Thus, a parent who had withdrawn her child from a public school and enrolled her in an out-of-state private school was not entitled to reimbursement for tuition and transportation costs. However, since the commencement of the litigation in *Ellis*, the state has amended its statute permitting out-of-state placements for gifted students.[472] But, as the court indicates in *Ellis*, reimbursement would still not be required for tuition and transportation resulting from unilateral parental placement at an out-of-state private school where the public school district has established an appropriate program to meet the child's needs as set forth in the IEP. To this extent, "exceptional student[s]" in Pennsylvania, whether mentally gifted or those with disabilities, are treated the same.

F. Transportation for Purposes of Desegregation

1. Rationale for Mandatory Busing

The use of mandatory busing to achieve racial integration has had a turbulent judicial history. As one federal judge observed, "The question of mandatory busing is perhaps the single most divisive issue in any school desegregation plan.... Few ideas are more calculated to lead to public resistance of a plan than the thought of small children being forced to travel great distances away from their homes."[473]

Ironically, the perceived drastic measure of mandatory busing to eliminate segregation has frequently been only a necessary response to local pressure on school boards to resist integration of school attendance zones. Some of the school board actions in avoiding or forestalling school integration as they implicate transportation have been moving white student population areas into school attendance zones that had a greater predominance of white students,[474] permitting white students to pay tuition and transfer to predominantly white public schools,[475] and closing of schools in predominantly black areas.[476]

The use of mandatory busing has had its limits. In *Lauderdale County School District v. Enterprise Consolidated School District*,[477] the Fifth Circuit overturned a district court order for interdistrict busing of black

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[471] 651 A.2d 616, 620 (Pa. Commw. Ct. 1994).
[472] *Id.* at 620, n. 4.
[473] Hoots v. Commonwealth, 539 F. Supp. 335, 344 (W.D. Pa. 1982).
[474] United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1233-34 (2d Cir. 1987).
[475] Berry v. School Dist. of Benton Harbor, 564 F. Supp. 617, 621 (W.D. Mich. 1983).
[476] *Hoots*, 539 F. Supp. at 341. ("The wishes of the parents in the predominantly white neighborhood [to not want their children to attend a school in a predominantly black area with the possibility of those parents taking their children out of the public schools] is not a valid consideration in the adoption of a desegregation plan. The closing of formerly black schools for racial reasons is a prohibited form of discrimination.").
[477] 24 F.3d 671 (5th Cir. 1994).

students where there was no evidence of interdistrict acts of segregation or segregative intent. The reason for desiring such transfer, enrollment of enough students to maintain accreditation, was insufficient to justify the transfer, even though one of the options might have to be dissolution of the district. Where mandatory busing has ended, other options to provide equal educational opportunities must be considered, such as providing black and Hispanic students equal access to the best qualified teachers, equal facilities and plants, equal access to advanced or special admission course offerings and equal allocation of resources.[478]

2. De jure Segregation

In evaluating desegregation plans, courts have had to consider a wide range of factors: the unitary or nonunitary status of the school district; the distance and length of time of bus travel; the age of the students involved; and, the presence or absence of other segregation patterns in the community. A judicial determination that a school district has engaged in de jure segregation, primarily by means of gerrymandering school attendance zones, so as to establish and preserve segregated schools has resulted in drastic judicial mandatory busing orders. In *Hoots v. Commonwealth of Pennsylvania*,[479] five school districts in Pittsburgh, four overwhelmingly white and one overwhelmingly black, were ordered to be consolidated into one desegregated district. The court rejected a proposed district busing proposal that would have only bused black students to predominantly white schools because "the alienation which results when groups of children are continually split apart and shuttled between schools with differing student bodies will fall primarily on black students, while white students continue their education as a cohesive group."[480]

The experience in *Hoots* illustrates the confluence of three policy concerns: eliminating the vestiges of official or de jure segregation; providing desegregated educational services; and minimizing inconvenience to the clientele being served, namely the students. In *Hoots*, development of a clustering plan involving "linking contiguous elementary schools together to form a compact attendance zone" broke up the segregated attendance areas, provided for integrated schools, and resulted in

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[478] Pennsylvania Human Relations Comm'n v. School Dist. of Phila., 638 A.2d 304 (Pa. Commw. Ct. 1994).

[479] For a history of this protracted litigation, *see* 672 F.2d 1107, 1109-10 (3d Cir. 1982). Over a span of 11 years between 1972 and 1983, *Hoots* had an incredible 14 reported cases, referred to as *Hoots* I through XIV. For a list of the citations, *see Hoots* XIV, 703 F.2d 723 (3d Cir. 1983) n. 1.

[480] *Hoots*, 539 F. Supp. at 340.

one-way travel time of twenty minutes or less.[481] In school attendance zones where mandatory busing time could be minimized and where, as in *Hoots*, white students had already been accustomed to being bused to predominantly white schools, the idea of student transportation was neither excessive nor impractical. In a slightly different approach to busing assignments, a federal appeals court in *United States v. Lawrence County School District*,[482] has indicated that a school board actually needed to gerrymander the bus routes where, despite seventeen years under court-ordered desegregation, two-thirds of buses were still 75% of one race and one-third of buses were 100% of one race.

3. Changing Demographics

Changing demographics, however, may compel courts to evaluate desegregation plans in light of the above three policy concerns with different results. In *United States v. Board of Education of the City of Chicago*,[483] a school board plan to desegregate Chicago's largely black and Hispanic public schools was upheld as constitutional even though mandatory busing was not included as part of the plan. With the student demographics having changed dramatically over the period of thirteen years and the percentage of white students having declined from 34% to 16%,[484] the federal district court made two perceptive observations: "the inclusion of mandatory busing in a plan has importance to minority parents as evidence the plan is really committed to equal and nonsegregated education for their children;"[485] and "it would be ironic to require token transfers of white students to predominantly-black or all-black schools to serve that purpose, when the use of tokenism in other contexts is properly offensive to every minority group."[486] While the two observations may appear facially to be contradictory, the court noted that experiences with mandatory busing in comparable cities like Los Angeles, Boston, and Detroit demonstrated that 40% to 45% of white students reassigned by transportation to minority schools could be expected to be lost to nonpublic or suburban schools, thus making desegregation even more improbable.[487] The court attempted to bridge the gap between the constitutional proscription of segregated education and the practical realities of population demographics:

> Court involvement in school desegregation cases derives from the Equal Protection Clause. One obvious facet of

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[481] *Hoots*, 539 F. Supp. at 345, 346.
[482] 799 F.2d 1031 (5th Cir. 1986).
[483] 554 F. Supp. 912 (N.D. Ill. 1982).
[484] Black students had increased from 54.8% to 60.7% and Hispanics from 9.7% to 20.4%. *City of Chicago*, 554 F. Supp. at 916.
[485] *Id.* at 925.
[486] *Id.* at 925-26.
[487] *Id.* at 925.

> equal protection of the laws is the extent to which a desegregation plan, required to address the right to equality of education, may itself impose disproportionate burdens on the already disadvantaged students participating in the plan.... Once within the range of constitutionally permissible desegregation plans, however, the Board [of Education is] free to choose one calculated to minimize parent resistance and thereby serve its larger goal.[488]

In *Missouri v. Jenkins*,[489] the U.S. Supreme Court put the brakes on a federal district court's spending spree that was annually costing the State of Missouri over $200,000,000 per year to fund "an elaborate program of capital improvements, course enrichment, and extracurricular enhancement not simply in the formerly identifiable black schools, but in schools throughout the district."[490] Using theories such as "desegregative attractiveness" and "suburban comparability," the district court judge had turned the purpose of desegregation from redistributing students within the school district to remedy poor student achievement, to attracting nonminority students not presently enrolled in the Kansas City Metropolitan School District [KCMSD]. Because the district court in *Jenkins* had never found interdistrict segregation when the case began eighteen years earlier, the Supreme Court found that by attempting to make KCMSD into a district-wide magnet school to attract students from outside the district, the district court was attempting to accomplish the interdistrict transfer of students through means it lacked remedial authority to accomplish directly. Whether or not white flight had occurred as a result of the de jure segregation in KCMSD was irrelevant because there was no evidence that the suburban districts had caused the flight and therefore should be included in the district court's remedy. Keeping in mind that KCMSD is 68.3% black, this latest decision in *Jenkins* is important because a district court cannot fashion and extend its remedy simply because it considers that "a purely intradistrict remedy would be insufficient"[491] to achieve quality education.

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[488] *Id.* at 922, 925.

[489] 115 S. Ct. 2038 (1995).

[490] *Id.* at 2051. *See* Missouri v. Jenkins, 495 U.S. 33 (1990) (the expenditures financed "high schools in which every classroom will have air conditioning, an alarm system, and 15 microcomputers; a 2,000-square-foot planetarium, green houses and vivariums, a 25-acre farm with an air-conditioned meeting room for 104 people, a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and animation lab; a temperature controlled art gallery; movie editing and screening rooms; a 300-square-foot dust-free diesel mechanics room; 1,875-square-foot elementary school animal rooms for use in a zoo project; swimming pools"). *Id.* at 77 (Kennedy, J., concurring in part and concurring in judgment).

[491] 115 S. Ct. at 2050.

4. Unitary Status

Where a public school district has been determined to be unitary, i.e. no longer engaged in de jure segregation, courts tend to minimize the role of busing in the arsenal of desegregation remedies. In *Ross v. Houston Independent School District*,[492] the racial composition within the city of Houston had changed substantially from 1970 when the first desegregation plan had been entered into.[493] The city school district over a period of ten years had developed desegregation plans using pairing and busing and magnet schools.[494] In 1980, the federal government sought to include twenty-two neighboring districts in a massive multidistricting plan. The federal district court denied the government's position and determined that "the district has eliminated the vestiges of *de jure* segregation in the composition of the student body of individual schools even though many schools are identifiably one-race."[495] In addition, the district court noted that the past inadequacies of busing as a desegregation tool and decided that "there are not enough white students left in the district to effect greater integration of student bodies without untoward costs on the students themselves."[496] Where a school district has removed the vestiges of de jure segregation, the federal appeals court agreed with the district court's rejection of government demands for cross-district busing.[497]

The type of analysis used in *Ross* regarding desegregation and demographics has been evidenced in more recent decisions. In *Tasby v. Wright*,[498] a federal district court has upheld the establishment of four neighborhood remedial educational centers and the end of mandatory busing in the Dallas Independent School District. In 1976 the federal court had approved a desegregation plan that had bused minority students, grades four through six, from West Dallas to North Dallas, but in the succeeding nine years the white student population in Dallas had declined 44% and the average minority population throughout the dis-

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[492] 699 F.2d 218 (5th Cir. 1983).

[493] *Id.* at 220. In 1970 the student population was 53.1% white, 33.5% black, and 13.4% Hispanic. By 1978-79 the percentages were 30.8% white, 45% black, and 24.2% Hispanic. By 1985-86 the enrollment was projected to be 20% white, 38% black, and 42% Hispanic.

[494] *Id.* at 224.

[495] *Id.*

[496] *Id.* at 226. The appeals court noted that "even if some method were devised to spread white students equally among all schools in the system, 74% of the students in each school would be black and Hispanic."

[497] The district court had originally defined racial imbalance as "the situation that exists when the combined minority student enrollment in a school exceeds the district-wide combined average by 20 percentage points, provided that the single minority enrollment ... of no school will exceed fifty percent of the student body." 473 F. Supp. 996, 1006 (W.D. Wash. 1979).

[498] 630 F. Supp. 597 (N.D. Tex. 1986).

trict had risen to 78.2%.[499] In ending the use of mandatory busing the court noted both the reality of demographics and the qualitative educational changes the district was proposing in the new centers. Following the opening of additional learning centers, the federal district court in 1994 declared the school district to be unitary, finding that 79% of the remaining achievement gap was due to socioeconomic factors rather than to race.[500]

> In the court's opinion it is pointless to bus minority students from the minority neighborhoods of West Dallas to attend predominantly minority schools in North Dallas; such transportation does not serve a desegregative purpose.... The court finds that the small class sizes, the emphasis on skilled teachers and specially trained administrators, and the longer school day, together with the other benefits detailed in the West Dallas Plan, are more likely to benefit desegregation than the present busing to North Dallas 4-6 Centers.[501]

Similarly, in *Flax v. Potts*,[502] a federal court of appeals has upheld a federal district court order that busing for desegregative purposes be discontinued in the Fort Worth Independent School District. The court reasoned that continued busing would have the effects of transporting black students from relatively integrated schools to predominantly black ones and white students from predominantly black schools to predominantly white ones, of displacing time from student involvement in extracurricular activities and parent involvement in schools, and expending money on busing that better could be used in the primarily minority schools.[503]

Establishment of a voluntary reassignment plan in the Austin Independent School District has been upheld for elementary-age students with students attending Priority Schools in close proximity to their homes.[504] In light of an earlier determination that the school district was a unitary district, the court was able to consider the district's plan independently of past discrimination practices with the burden of proving discriminatory intent consequently resting with the Plaintiffs, and then to reach the conclusion that "[i]t is proper for a school district to consider the age of

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[499] *Id.* at 603.
[500] Tasby v. Woolery, 869 F. Supp. 454 (N.D. Tex. 1994).
[501] *Id.* at 603, 607.
[502] 864 F.2d 1157 (5th Cir. 1989).
[503] *Id.* at 1161. The net savings to the school district was estimated to be $175,000.
[504] Price v. Austin Indep. Sch. Dist., 729 F. Supp. 533 (W.D. Tex. 1990).

students in evaluating the extent to which they should be subjected to involuntary transportation."[505]

Oklahoma City's ending of busing for kindergarten through fourth grades was upheld even though the number of elementary schools with more than black or nonblack student populations increased dramatically.[506] Applying a "good faith" test, the court found that the neighborhood schools were a reasonable way to increase parental support and that the school board was unlikely to return to segregative practices which had existed prior to unitary status. They observed that "[t]he fact that residential segregation continues, and that neighborhood schools may be predominantly of one race, is no longer considered traceable to the school board, but rather is viewed as the individual choices of socio-economic forces."[507]

5. Neighborhood Housing Discrimination and Busing

The elimination of mandatory busing in favor of neighborhood schools, especially where the busing would be from one minority area to another, depends on whether other factors may have contributed to the minority character of a neighborhood. In *United States v. Yonkers Board of Education*,[508] federal courts found that both the city of Yonkers and the school board were responsible for the segregation of blacks and Hispanics in the city's schools. While the city was responsible for construction of virtually all minority housing in only one section of the city, the school board had contributed to the segregative pattern by means of school zone assignments, staff assignments, placement of minorities in special education classes, selection of schools to open or close, and systematic exclusion of minorities from vocational programs.[509] The comprehensive transportation plan ordered by the federal courts, including free busing for all students throughout the district to new magnet schools, for students participating in the voluntary transfer program, for students more than one and one-half miles from their neighborhood schools, and for adults enrolled in adult programs,[510] was more expensive than a simple mandatory busing plan would have been,[511] but the courts demonstrated

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[505] *Id.* at 550. The neighborhood schools allowed the district to meet one of its goals of reducing the length of bus rides for most elementary-age students to less than 45 minutes. *Id.* at 537, 538.

[506] Dowell v. Board of Educ. of Okla. City Pub. Sch., 8 F.3d 1501 (10th Cir. 1993).

[507] *Id.* at 1520.

[508] 837 F.2d 1181 (2d Cir. 1987).

[509] *Id.* at 1227-32. A comprehensive discussion of the discrimination in both housing and schools can be found in United States v. Yonkers Bd of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985).

[510] *See Yonkers*, 635 F. Supp. 1538, 1550 (S.D.N.Y. 1986).

[511] *Yonkers*, 837 F.2d at 1237-39.

no sympathy for either the school district's determination of segregative intent or the city's responsibility for having to fund the more expensive transportation scheme.

> It was not the Board's failure to adopt busing that violated the minority students' rights; rather the evil lay in the combination of the Board's promotion and enhancement, through deliberately discriminatory acts and practices, of a segregated school system and its purposely discriminatory refusal to take any significant desegregative action whatever.[512]

The sequel to cases such as *Yonkers* has been the active involvement of school boards in other school districts to draft agreements with municipalities and developers concerning the rental and sale of housing units to achieve racial integration. The impetus for such efforts have been school board policies, prompted in significant part by the threat of loss of federal funds by the U.S. Department of Education's Office of Civil Rights, which grant reprieves for school children from being bused for racial balance if the neighborhoods are racially balanced. Most of the agreements follow the same basic formula:

> The school board agrees to waive a given area from compliance with forced-busing as long as, by a set deadline, the student population sent by that area to local schools is racially balanced, or 10 percent to 40 percent black. The agreements generally contain a strategy for promoting housing integration that may include building dwellings of varying sizes, lowering rents, and targeting marketing campaigns at blacks. Whites in search of a home, meanwhile, hear the pitch that a given neighborhood is free of busing.[513]

Courts have discretion in determining how transportation expenses to achieve desegregation are to be allocated. In *Yonkers*, the city of Yonkers was ordered to fund the court-ordered remedy, while the school board was responsible to submit itemized expenses to verify that the increased funds for the schools were indeed being spent on the schools.[514] In *Berry*

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[512] *Id.* at 1232-33. However, not all defendants were liable for racial segregation. *See* United States v. City of Yonkers, 880 F. Supp. 212 (S.D.N.Y. 1995) (Board of Regents and Department of Education could be sued under Title VI but state not liable under section 1983).

[513] EDUC. WK., Feb. 26, 1992, at 9, cols. 3-4.

[514] *Yonkers*, 837 F.2d at 1239.

v. School District of City of Benton Harbor,[515] a federal district court judge approved a voluntary transfer plan between a predominantly black city district and two largely white adjacent rural districts. In addition to ordering the three districts to design an interdistrict transportation plan, the state was ordered to pay two-thirds of the districts' desegregation transportation costs.

IV. Conclusion

Transportation problems in education present a complex collage of interacting issues. Governance concerns regarding the operation and funding of school transportation can be a sensitive state political issue. Sorting out the constitutional and statutory responsibilities among the legislature, the state department of education, and the local school district has not always been easy, but the task must be done if unnecessary duplication of work and contradictory directives are to be avoided. Even if administrative responsibilities are clearly determined, legislative or administrative statutes or regulations face judicial scrutiny under federal and state constitutional standards, as well as consistency within the total state legislative scheme. At the day-to-day operational level, school boards and district administrators are responsible for assuring safety in transporting students according to established guidelines.

Transportation Guidelines

Recommendations for school transportation are not easy to make where transporting students is almost solely a state responsibility. Yet, a number of generic suggestions can be proposed:

1. Student transportation is an extremely expensive matter and state reimbursement aid is critical if school districts are to provide services as mandated by state or federal law. The important condition precedent to reception of state reimbursement is compliance with state and/or federal requirements pertaining to deliverance of transportation services. In an increasingly regulated society where public schools have become the laboratories to effect social change, knowledge of yet one more regulated area, in this case student transportation, is important if the schools are to be able to afford the cost of achieving their legislatively designed purposes.

2. State statutes and regulations in every state provide categorical funds for transportation of students with disabilities. To the extent, the demand for these funds is diminished through lower transportation

[515] 554 F. Supp. 912 (N.D. Ill. 1983).

costs resulting from inclusion, states should consider permitting these funds to be used for other education options.

3. Schools and school districts must have coherent policies consistently enforced pertaining to the types of vehicles to be used on school activities. Where school administrators do not want to use school-owned buses for school-related or school-sponsored activities, they need to consider that decision carefully in light of any legal problems concerning alternate forms of transportation. The use of private student or faculty cars has always been a concern for administrators and the car owners alike. At the very least, administrators should advise a person using his/her private vehicle to transport students to carry adequate liability insurance. Similarly, renters of leased vehicles need to be advised that the rental company's liability will generally be limited to that of the renter's own vehicle insurance. To reduce the possibility of separate exposure of individual faculty member liability, schools may want to consider leases or rentals directly in the name of the school or school district. Where faculty engage in collective bargaining, the union may wish to consider the purchase of adequate liability insurance for faculty in the course of their employment as a subject to be included in the collective bargaining agreement.

4. The care which parents/guardians expect schools to extend to students will often result in litigation where injury appears to have occurred because the level of care expected was not achieved. Although not all problems can be prevented, certain kinds of preventive measures are clearly within the control of schools and school districts. Regular maintenance of school-owned buses is certainly a responsibility schools will be expected to meet, and use of buses that are defective and do not satisfy appropriate state safety standards will not be readily defensible. Even where school bus service is contracted with private bus companies, schools and school districts have a responsibility to report defects and to demand that repairs be made. Failure to make repairs could result in contract rescission. Where school bus drivers are employees of the school or school district, the school or school district will be expected to monitor compliance with state standards and to take appropriate action if a driver-employee is in violation of a standard. If the driver in violation of a state standard is an employee of a private contractor, the school or school district responsibility may include not only reporting the offending driver to the appropriate officials, but also possible rescission of the bus contract.

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